

10,2895
No. 14415

United States
Court of Appeals
for the Ninth Circuit

HENRY A. KUCKENBERG, HARRIET KUCK-
ENBERG and LAWRENCE KUCKEN-
BERG, Doing Business as KUCKENBERG
CONSTRUCTION CO.,

Appellants,

vs.

HARTFORD ACCIDENT & INDEMNITY COM-
PANY, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

FILED

OCT 1 1954

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In the United States District Court
for the District of Oregon

Civil No. 5092

HENRY A. KUCKENBERG, HARRIET KUCK-
ENBERG and LAWRENCE KUCKEN-
BERG, d/b/a KUCKENBERG CONSTRUC-
TION CO.,

Plaintiffs,

vs.

HARTFORD ACCIDENT & INDEMNITY COM-
PANY, a Corporation, and SOUTHERN
PACIFIC COMPANY, a Corporation,

Defendants.

PRE-TRIAL ORDER

The above-entitled action came on for pre-trial conference before the Honorable Gus J. Solomon, Judge of the above-entitled Court, on Monday, June 1, 1953. at 10:00 o'clock a.m., in the United States District Courtroom at Portland, Oregon. Plaintiffs appeared by and through Arno H. Denecke, one of their attorneys. Defendant Hartford Accident & Indemnity Company appeared by and through James Arthur Powers, one of its attorneys. Defendant Southern Pacific Company appeared by and through John Gordon Gearin, one of its attorneys.

The following facts were agreed upon among the parties:

Agreed Facts

1. At all times herein concerned plaintiffs Henry A. Kuckenberg, Harriet Kuckenberg and Lawrence Kuckenberg were and are co-partners doing business as Kuckenberg Construction Co. with their office and principal place of business in Multnomah County, Oregon. At all of said times plaintiffs were and are now citizens of the State of Oregon.

2. At all times herein concerned defendant Hartford Accident & Indemnity Company was and is now a corporation duly organized and existing under and by virtue of the laws of the State of Connecticut and was and is engaged in the insurance business in the State of Oregon.

3. At all times herein concerned and to and including October 16, 1947, defendant Southern Pacific Company was a corporation duly organized and existing under and by virtue of the laws of the State of Kentucky and authorized to do business and doing business in the State of Oregon as a railroad company. On September 3, 1947, all of the assets of Southern Pacific Company, a Kentucky corporation, were transferred to Southern Pacific Company, a Delaware corporation. On October 16, 1947, Southern Pacific Company, the Kentucky corporation, withdrew from business in the State of Oregon. On December 15, 1947, Southern Pacific Company, the Kentucky corporation, was dissolved. Since September 3, 1947, and at all times referred to in the complaint subsequent thereto, the business

of Southern Pacific Company, the Kentucky corporation, has been and is being conducted by Southern Pacific Company, the Delaware corporation. The parties to the instant controversy having considered Southern Pacific Company as being one corporation during all of the times herein concerned.

4. The amount in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

5. On or about May 7, 1947, plaintiffs entered into various contracts with the United States of America whereby plaintiffs undertook to and did construct portions of a public highway, sometimes known as the North Santiam Highway, in Marion County, Oregon. A true and correct copy of one of said contracts, 24-A2 is attached hereto, marked plaintiffs' Exhibit . . ., and made a part hereof together with various specifications and a bid schedule which were made a part of the said contract. The terms and conditions of plaintiffs' Exhibit . . ., including various said specifications and said bid schedule, were at all times herein concerned known to defendant Hartford Accident & Indemnity Company.

6. On July 2, 1947, plaintiffs entered into a contract with the defendant Southern Pacific Company in respect to certain required insurance and certain construction work involved in this controversy as was expressly required by plaintiffs' said construction contract with the United States of America. The said requirement in the plaintiffs' said con-

struction contract with the United States was in turn expressly required by a prior agreement entered into by the Southern Pacific Company and the State of Oregon, acting by and through its State Highway Commission, dated May 28, 1947, relating to the acquisition by the State of the right to construct highway slopes upon and along certain portions of the said Company's right of way in Marion County, Oregon. Said Commission in turn contracted with the United States Public Roads Administration, an agency of the United States, for the construction of the said highway, and said Administration contracted with the plaintiffs, the contractor, on the behalf of the United States. A true and correct copy of said contract of July 2, 1947, is attached hereto marked plaintiffs' Exhibit ... and made a part hereof.

7. As further required by said construction contract with the United States, plaintiffs on January 26, 1948, formally entered into a contract with the defendant Southern Pacific Company in regard to protecting certain property from damage as a result of said construction work referred to in Plaintiffs' Exhibit 1 above and providing for the reimbursement of the said railroad for certain of said work which said railroad might be required to do. A true and correct copy of said contract of January 26, 1948, is attached hereto, marked Plaintiffs' Exhibit ..., and made a part hereof. Said two contracts were at all times herein concerned considered by the

parties hereto as one contract covering the period commencing July 2, 1947.

8. Pursuant to the requirements of the said construction contract, Plaintiffs' Exhibit . . . , plaintiffs contracted with and did receive from the defendant Hartford Accident & Indemnity Company a bodily injury and property damage liability insurance policy effective April 1, 1947, as modified by certain endorsements to the said policy effective on that date and other endorsements effective subsequently. Effective on July 29, 1948, the defendant Hartford Accident & Indemnity Company cancelled the said policy as provided by the policy and complied in all respects with the said cancellations section of said policy. A true and correct copy of said policy of insurance together with endorsements is attached hereto, marked Plaintiffs' Exhibit . . . and made a part hereof. A true and correct copy of said notice of cancellation is attached hereto, marked defendant Hartford's Exhibit . . . , and made a part hereof.

8a. Defendant Hartford Accident & Indemnity Company issued to the defendant Southern Pacific Company and Western Union Telegraph Company, at the instance and at the cost of the plaintiffs, a policy of insurance No. CL43726, which said policy was in effect May 14, 1947, through May 14, 1948, and that said policy of insurance bore endorsement No. 1 effective May 14, 1947, and endorsement No. 2 effective September 30, 1947, and thereafter said defendant Hartford issued its continuation certificate to said policy and endorsements thereto cov-

ering the period from May 14, 1948, to May 14, 1949.

9. Pursuant to said construction contract, plaintiffs were required to and did work in close proximity to a railroad line of defendant Southern Pacific Company.

10. From on or about June 2, 1947, until on or about July 29, 1948, a period during which the plaintiffs were constructing said highway, property of Southern Pacific Company was damaged. After the completion of the said highway, plaintiffs engaged in certain work of reconditioning said railroad from on or about April 4, 1949, until on or about May 6, 1949.

11. Defendant Hartford Accident & Indemnity Company has denied any liability to the plaintiffs and refused to pay plaintiffs for any amounts allegedly expended by the plaintiffs in respect to the repair of said damage.

12. Plaintiffs have demanded that defendant Southern Pacific Company pay plaintiffs for certain sums so expended by plaintiffs but defendant Southern Pacific Company has refused to pay said sums or any part thereof.

13. Plaintiffs performed work and furnished materials in repairing the property of the defendant Southern Pacific Company during the period commencing on July 1, 1947, and ending on May 6, 1949.

14. Plaintiffs tendered to the defendant Hartford Accident & Indemnity Company on December 1, 1949, the defense of the counterclaim brought by the defendant Southern Pacific Company in the amount of \$8,762.16 as evidenced by plaintiffs' Exhibit . . . , and the defendant Hartford Accident & Indemnity Company on December 7, 1949, refused to assume the defense of said counterclaim on behalf of the plaintiffs.

15. Southern Pacific Company made timely and appropriate demand upon Hartford Accident & Indemnity Company to defend plaintiffs' claim against Southern Pacific Company and tendered the defense thereof of the instant claim to the said defendant Hartford, which refused said tender.

16. Southern Pacific Company made timely and appropriate demand upon defendant Hartford to pay to defendant Southern Pacific Company the amount of its damages in the sum of \$8,762.16 but defendant Hartford refused to pay the amount of said damages or any part thereof.

17. Southern Pacific Company made timely and appropriate demand upon the plaintiffs for the payment of Southern Pacific Company's alleged damages in the sum of \$8,762.16 but plaintiffs have refused to pay said damages or any part thereof.

18. That the schedule of items consisting of all items of damage claimed by the plaintiffs has been furnished by the plaintiffs to the defendants and

that said schedule contains a full and complete list of the items being claimed in this litigation.

19. That it is agreed that if during the trial the plaintiffs seek a reformation of the various insurance contracts that the reformation so sought shall be in the form heretofore reduced to writing and submitted to the attorneys for the respective parties by plaintiffs' counsel and it is further agreed that plaintiffs, in any event, make their claim for recovery herein on the basis that the items of damage were caused by "accident."

Contentions of the Plaintiffs

1. The plaintiffs contend that they may be obligated to pay for all or part of the damage done to the property of the defendant Southern Pacific Company; this obligation may be because of liability imposed by law, irrespective of any contractual assumption of liability, or by reason of contracts, Plaintiffs' Exhibit . . ., entered into between the plaintiffs and the defendant Southern Pacific Company whereby the plaintiffs agreed to protect Southern Pacific Company from damage to its property and to reimburse the defendant Southern Pacific Company for the work done by said company in repairing said damage.

2. If the plaintiffs are liable for said damage either by liability imposed by law or by liability assumed by the plaintiffs under contract then, the defendant Hartford Accident & Indemnity Company is obligated by the policy of insurance issued

to the plaintiffs, Plaintiffs' Exhibit . . ., to pay for the said damage to the defendant Southern Pacific Company's property.

3. If the plaintiffs are held to be liable to the defendant Southern Pacific Company for said damage by reason of the contracts, which are Plaintiffs' Exhibit . . ., the defendant Hartford Accident & Indemnity Company is liable to the plaintiffs for the amount of said damage by reason of any or all of the following:

(a) Said contracts were part of an easement agreement, Plaintiffs' Exhibit . . ., and the defendant Hartford Accident & Indemnity Company in the policy in which the plaintiffs are named assureds, Plaintiffs' Exhibit . . ., insured for liability assumed under an easement agreement.

(b) That on April 1, 1948, the defendant Hartford Accident & Indemnity Company specifically agreed to assume to be obligated for the liability of the plaintiffs assumed under any contracts pertaining to the performance of construction contracts of the plaintiffs.

(c) That it was the mutual intention of the plaintiffs and the defendant Hartford Accident & Indemnity Company at the time the policy naming plaintiffs was effective, Plaintiffs' Exhibit . . ., namely, April 1, 1947, that said policy of insurance was to insure the plaintiffs against any liability assumed by the plaintiffs pursuant to the provisions of the plaintiffs' contract with the Public Roads

Administration, Plaintiffs' Exhibit . . . , and if said policy of insurance does not so insure, this error was by mutual mistake of the plaintiffs and the defendant Hartford Accident & Indemnity Company and said policy of insurance should be reformed so that effective April 1, 1947, it insured the plaintiffs for liability assumed by the plaintiffs by contract as required by plaintiffs' contract with the Public Roads Administration, Plaintiffs' Exhibit . . .

4. Damage done to the property of the defendant Southern Pacific Company was caused by "accident" as such word is used in the policy of insurance concerned herein.

5. The plaintiffs gave notice of said accidents to the defendant Hartford Accident & Indemnity Company as soon as practicable; the defendant Hartford Accident & Indemnity Company had notice of said accidents; that in the event it is found that plaintiffs did not give said notice and said defendant had no notice the said defendant waived notice of said accidents by denying any coverage therefor under its policies of insurance and by specifically waiving any obligation the plaintiffs may have had in regard to notice.

6. The defendant Hartford Accident & Indemnity Company by denying it was obligated to pay for said damage waived that provision of the policies that no action lies against the said defendant

until final judgment against the plaintiffs or agreement of the defendants herein.

7. That the plaintiffs repaired the property of the Southern Pacific Company in lieu of the defendant Southern Pacific Company's making said repairs and then making claim against the plaintiffs or the defendant Hartford Accident & Indemnity Company therefor in order to mitigate and lessen the amount of the damages to the property of the defendant Southern Pacific Company.

8. That the work performed by the plaintiffs and the materials furnished by the plaintiffs for the repair of the property of the defendant Southern Pacific Company was in the amount of \$42,002.66 and said amount is a reasonable amount for said work performed and materials furnished.

9. That in the event the plaintiffs were not liable to the defendant Southern Pacific Company for any or all of the damage to the property of the defendant Southern Pacific Company then the defendant Southern Pacific Company is liable to the plaintiffs for the reasonable value of the repair done by the plaintiffs to the property of the defendant Southern Pacific Company but not in excess of \$5,438.99 and that said repairs were furnished at the instance and request of the defendant Southern Pacific Company.

10. In regard to the counterclaim of the defendant Southern Pacific Company plaintiffs were not liable for the damage which was repaired by the

defendant Southern Pacific Company; if the plaintiffs were liable therefor the defendant Hartford Accident & Indemnity Company is obligated therefor by reason of the insurance policy naming the plaintiffs as assureds, Plaintiffs' Exhibit . . ., and by reason of the policy naming the defendant Southern Pacific Company as assured, plaintiffs' Exhibit . . .

10a. That the policy of insurance naming the defendant Southern Pacific Company as named assured, plaintiffs' Exhibit . . ., is an agreement by the defendant Hartford to pay to the defendant Southern Pacific Company for any damage done to the property of the defendant Southern Pacific Company for which plaintiffs are liable by reason of their contract with the defendant Southern Pacific Company and by reason of the plaintiffs furnishing said policy for the defendant Southern Pacific, the plaintiffs were not liable to the defendant Southern Pacific for said damage and performed the work of repairing said damage for the account of the defendant Hartford in fulfillment of the defendant Hartford's obligation under said policy of insurance to the defendant Southern Pacific.

10b. If the policy of insurance naming the defendant Southern Pacific as assured does not provide as in (10a) above, the provisions therefor are in error and were made by mutual mistake of the defendant Hartford and the plaintiffs and the said policy should be reformed to express the intention of said parties.

11. That the defendant Hartford Accident & Indemnity Company is further liable to the plaintiffs for fees for attorneys of the plaintiffs not to exceed \$10,000.00; said liability is pursuant to Section 101-134 O.C.L.A.

12. The defendant Hartford Accident & Indemnity Company is further liable to the plaintiffs for the reasonable expenses, including attorney's fees, incurred by the plaintiffs in defending against the counterclaim brought by the defendant Southern Pacific Company in an amount not to exceed \$2,500.00.

Contentions of the Defendant Hartford
Accident & Indemnity Company

Defendant Hartford Accident & Indemnity Company admits that it issued a bodily injury and property damage liability insurance policy which was in effect until duly cancelled, effective July 29, 1948, but denies that the facts and circumstances alleged in plaintiffs' contentions invoke the provisions and terms of the said policy so as to impose liability on this defendant for these reasons:

A. Plaintiffs agreed in their contract to take care of the damage they are now making claim for here and were paid an extra consideration to cover the cost of taking care of said damage.

B. Following this provision of their agreement plaintiffs proceeded at their own cost and expense to repair the damage they had caused through their

own operation. Plaintiffs a long time thereafter prepared what appears to be an estimate of their expenses in making such repair, and although compensated for such expenses under their contract, plaintiffs now make claim here against Hartford under a policy of Public Liability insurance to again recover for the items of expense for which they have already been paid by the government under their contract with the government and Southern Pacific.

The items of damage follow a pattern of the same design—a series of similar blasts would blow the blasted rocky material down the mountain gorge onto the Southern Pacific tracks at the bottom of the gorge and damage it; this damage was operational in nature and should have in most instances been protected against by proper safeguards; when such safeguards were not used, the same type of damage occurred repeatedly.

The policy of insurance was written to furnish protection to plaintiffs against liability to third parties arising out of damage to third parties' property when such liability is imposed by law; in other words, against tort liability, when caused by accident.

The series of similar items of damage here were not caused by accident. They were from repeated operations carried on by plaintiff. The items of damage were due to the habit—the habitual operations of plaintiff, and not to accident. The policy

of insurance was written at a low premium and does not cover, nor was it ever intended to cover, plaintiffs' contract liability to the Southern Pacific. Plaintiffs, by their contract (and for which they received extra compensation), first agreed to protect Southern Pacific property from damage, and when plaintiffs failed to so protect, plaintiffs agreed to be liable for the resulting damage.

Specifically, under the terms of the policy, there is no coverage here because:

a. Liability is limited to damage caused by accident.

b. Liability is limited to that imposed by law—i.e., to tort actions as distinguished from an action on contract.

c. Endorsement No. 15 relating to contract coverage, became effective only on and after April 1, 1948, and does not relate to nor cover the items of damage claimed here.

d. The liability of the answering defendant is expressly stated not to include injury to or destruction of property occupied or used by or in the care, custody or control of the plaintiffs or any of their employees.

2. The provisions of the said policy exclude from coverage items of damage which as here merely cover maintenance and repair work by the insured, the plaintiffs here.

3. Condition No. 9 of the said policy relating to

Notice of Accident was breached by the plaintiffs in that the answering defendant was not given written notice as soon as practicable of alleged accident or accidents; and, further, if any such notice was given, it did not contain particulars and information required by said condition.

4. The terms of the policy were violated and particularly condition No. 10 thereof, relating to notice of claim or suit, in that plaintiffs failed to give notice as required, but, on the contrary, plaintiffs, without knowledge or consent of this defendant, entered into an agreement with Southern Pacific, for repairing the items of damage now claimed for and making such arrangement voluntarily and without the consent or knowledge of defendant Hartford; and plaintiffs, by their acts and conduct, which were in violation of the terms of the policy, are estopped for asserting their claims here, and such claims, if they ever existed, were waived. That plaintiffs were merely fulfilling the requirements of their contract which required them, first, to protect Southern Pacific property against damage, and then if they failed to protect it and it was damaged, to stand the cost of repairing such damage.

5. Condition No. 11 of the said policy relating to Assistance and Co-operation of the insured was breached by the plaintiffs in that the alleged items of damage are matters which the plaintiffs, to the prejudice of the answering defendant, have been voluntarily making payments, assuming obligations,

and incurring expenses in connection with the demands of the defendant Southern Pacific Company and further have been disputing with, negotiating with, and counterclaiming against the said defendant.

6. Condition No. 12 of the said policy relating to Action against Company was breached by the plaintiffs in that the plaintiffs have, contrary to an express condition precedent stated therein wrongfully made the answering defendant a party to this action without first having fully complied with all of the terms of the said policy and the plaintiffs have further violated said Condition No. 12 in that plaintiffs have brought suit before the amount of the answering defendant's obligation to pay, if any, was finally determined.

7. In no event are plaintiffs entitled to recover any attorney's fees herein as no foundation has been laid for same, either under the policy or under statutory law, allowing same; and, further, because of the suit against this answering defendant before any final loss had been determined and before plaintiffs had fully complied with the terms of said policy, specifically, but not restricted thereof, plaintiffs failed to comply therewith, as follows:

a. The provisions of the said policy relating to notice of accident as set out aforesaid in paragraph 3; and in no event can attorney's fees be recovered without filing necessary proof of loss which has not been done, nor can attorney's fees be recovered because the plaintiffs themselves are in violation

of the policy, and in particular here where plaintiffs themselves filed the action against the answering defendant before the amount of answering defendant's obligation to pay, if any, was finally determined.

b. The provisions of the said policy relating to notice of claim as set out aforesaid in paragraph 4;

c. The provisions of said policy relating to co-operation of the insured as set out aforesaid in paragraph 5.

9. In any event, the attorneys' fees claimed are excessive and unreasonable.

B. The terms and provisions of the plaintiffs' said construction contract with the United States require the plaintiffs rather than the answering defendant to bear any expenses incurred or damage claims accruing as a result of damage to property of the defendant Southern Pacific Company.

1. The obligation imposed by the said construction contract that the plaintiffs procure certain specified policies of insurance was independent of and distinct from the several other contractual obligations imposed on the plaintiffs in respect to damages by the plaintiffs to the property of the said defendant Southern Pacific Company and said matters for which recovery is sought resulted from plaintiffs' said contractual obligations as hereinafter specified and said matters have no other basis and therefore do not involve the answering defendant in any way.

a. Said construction contract required the plaintiffs to procure certain policies of insurance for the protection of the defendant Southern Pacific Company and said policy relied upon by plaintiffs in their contention was procured to conform to the requirements of the said contract and the said policy was issued by the answering defendant to conform to the requirements of the said construction contract in regard to insurance and in view of the other provisions of the said construction contract.

b. Said construction contract required that all said required policies of insurance conform to the requirements of Works Program General Memorandum No. 32, signed by the Chief of the Bureau of Public Roads and dated January 27, 1937, and such requirements were generally applicable to all highway construction contracts entered into by the said U. S. Bureau of Public Roads or by its successor federal agencies since that date in regard to insurance protection in connection with certain projects involving railroads and here said policy issued by the answering defendant and referred to by the plaintiffs in their contention 1 conformed to the requirements stated in the said memorandum.

c. Separate and distinct from the said provisions of the said construction contract requiring the plaintiffs as contractors to procure the said required insurance policies and because of the special terrain and other conditions attending this said construction project as distinguished from other construction projects involving railroads to which

only said General Memorandum No. 32 was applicable, the said construction contract required that the plaintiffs assume the following special obligations:

(1) That the plaintiffs should protect the defendant Southern Pacific Company against damage to certain of the said defendant's property; and

(2) In the event that the said defendant Southern Pacific Company was required to do any work of the character specified in (a) on account of or for the purpose of accommodating the plaintiffs, the plaintiffs should reimburse the said defendant upon the rendition of bills therefor for all expenses incurred in connection with certain specified repairs; and

(3) That the plaintiffs subject to the supervision and control of the said defendant Southern Pacific Company's Chief Engineer or other designated officer should perform their work in such manner and at such times as that said work shall not endanger or interfere with the safe operations of the tracks and property of the said defendant and the traffic moving on said tracks or other property of the said defendant, its tenants, or licensees at or in the vicinity of the work.

2. To implement and to supplement the contractual obligations imposed on the plaintiffs and set out in paragraph 1(c) above certain parts of the said construction contract, designated "Special Provisions, Project Oregon 24-A-2" and "P.R.A.

Specifications FP-41 and Revisions in Specifications FP-41 as of July 15, 1941," provided that damage to the said railroad right of way was contemplated by certain construction operations required thereby and that the cost of repairing said damages was to be included in the bid amounts for the various items involved. Specifically, but not restricted thereto, the said special provisions and said specifications provided and the plaintiffs were informed and agreed that:

a. (1) Between Stations 691 + 85 and 714 ± 50, United B, the railway excavation involved was in such close proximity to the said defendant Southern Pacific Company tracks that some interference with the continuous operation of the said railroad and possible damage to its facilities would seem to be unavoidable.

(2) Construction should be performed by methods which would result in the least possible damage to the said adjacent railroad.

(3) Any materials or debris falling onto said adjacent railroad should be removed, and any damage to the said roadbed or track immediately corrected, and specifically, but not restricted thereto, broken rail, damaged ties and fouled ballast should be replaced in a workmanlike manner, and a stock of supplies necessary to make all such repairs should be kept on the project at all times to facilitate said repairs.

(4) The contract unit prices for the various

Unclassified Excavation Units should include full compensation for all special work necessary in blasting and excavation of the material to prevent damage to the railroad and any work necessary in removing debris unavoidably dropped on the roadbed of the said railroad and for a correction of any damages to that facility, and that any damages or costs involved which result from construction operations aforesaid should be at the expense and responsibility of the contractor.

(5) The measurement of yardage to be paid for by the United States should include overbreakage due to slides in common or unclassified excavation when not attributable to the carelessness of the said plaintiffs and further that the said measurement should also include unavoidable overbreakage occurring in material which would classify as solid rock, whether the contract calls for classified or unclassified excavation, to an amount not to exceed 10 per cent of the actual quantity contained within the lines shown on the plans for any 50-foot interval between a station and a half station.

b. (1) A special detour involving principally the alteration of said railroad roadbed opposite and between highway Stations 599 and 509 to carry vehicular traffic in addition to railroad traffic was to be constructed.

(2) Said detour was to be maintained in a workmanlike manner by the said contractor to carry both railroad and vehicular traffic, specifically but

not restricted thereto, said roadbed was to be kept free of debris, smooth and properly compacted and said railroad tracks were to be maintained true to alignment and grade and kept free of rocks and debris and further upon termination of the need for the said roadbed to be used as a special detour, said roadbed was to be restored to its original condition as nearly as possible.

(3) No payment would be made for maintenance or restoration of the said special detour but the work would be considered a necessary part of the cost of the project and covered in other contract items as specified except as to any work required by causes not directly caused by the said contractor's operations.

c. (1) Certain clearing, grubbing, snag removal, roadside cleanup, and other operations which might result in the deposit of trees, stumps, or other material on the said roadbed or in damage to the said railroad's property were to be conducted by said contractor.

(2) Bid prices for each of the items specified in (1) above should cover the complete cost of the removal and disposal of the said trees, stumps, or other material aforesaid.

In the alternative the plaintiffs contend:

(2) That from on or about August 1, 1947, until on or about August 1, 1948, the defendant Southern Pacific Company requested of the plaintiffs that plaintiffs repair damage to defendant Southern Pa-

cific's track roadbed, equipment and other personal property and to preserve the same. That at said request the plaintiffs furnished materials and performed labor in fulfillment of the request of the defendant Southern Pacific.

With regard to defendant Southern Pacific's counterclaim, the plaintiffs contend that in the event that the defendant Southern Pacific Company was damaged as alleged in its counterclaim that the plaintiffs had no tort liability therefor and assume no liability therefor by any contract or agreement.

Plaintiffs further contend that by reason of plaintiffs procuring, at their expense, a policy of insurance by which the defendant Southern Pacific was insured against damage to its property up to the amount of \$50,000.00, that the plaintiffs have no duty to the defendant Southern Pacific under the terms of the supplemental agreement entered into by the parties on January 26, 1948, to protect defendant Southern Pacific against damage to its property until and unless said damage exceeds the sum of \$50,000.00.

With respect to plaintiffs' 2:

Defendant Hartford Accident & Indemnity Company admits that it issued an owners' and contractors' protective public liability and property damage policy in favor of the defendant Southern Pacific Company as insured at the request of and at the expense of the plaintiffs.

The defendant Hartford denies that the facts and circumstances alleged in plaintiffs' contentions invoke the terms and provisions of the policy naming the Southern Pacific as an insured so as to impose liability on the defendant Hartford for the following reasons:

A. The terms and provisions of the said policy were not met and were violated in the following respects:

1. Insuring Agreement II, Property Damage Liability, of the said policy is inapplicable here since the liability of the answering defendant is expressly limited to liability imposed upon the said insured Southern Pacific Company by law for damages because of injury to or destruction of property and said liability relates only to third party claims arising out of torts committed by the said insured and the counterclaim of the said insured are not such claims but are claims to reimburse the said insured for certain expenses incurred by the said insured for work performed and materials used in repairing damage to the said insured's property.

2. Under Insuring Agreement II, Property Damage Liability, of the said policy, the liability of the answering defendant is expressly excluded from extending to liability for injury to or destruction of property owned or rented by the said insured or in the care, custody or control of the insured and here plaintiffs contend that said insured's counterclaim is for damage to property of the said insured.

3. Insuring Agreement II, Property Damage Liability, of the said policy is inapplicable here since the liability of the answering defendant is expressly limited to damages caused by accident and the damages alleged by the defendant Southern Pacific Company for which recovery is sought in its counterclaim were not caused by accident but were the foreseen and contemplated result of certain construction operations of the plaintiffs, which operations were purposely and deliberately carried out by servants of the plaintiffs or otherwise pursuant to the instructions of or with the approbation of the plaintiffs, and, further, that the "term" accident as used in the said policy has a more restricted meaning than "occurrence" and is not used synonymously therewith.

4. The liability of the answering defendant is expressly excluded from extending to operations performed by the said insured Southern Pacific Company or any of its employees and the expenses for which the defendant Southern Pacific Company have counterclaims were for operations performed by the said defendant Southern Pacific Company and its employees and were not for the general supervision work covered by the said policy and performed for the said insured by independent contractors.

5a. The liability of the answering defendant is expressly excluded from extending to liability assumed by the said insured under any contract or agreement and the said insured entered into an

agreement with the plaintiffs providing that certain repair work of the kind for which the said insured here counterclaims should be done by the said insured and therefore all such claims being based on contract with plaintiffs are not covered by the said policy.

b. The plaintiffs' obligations under the supplemental agreement allegedly of January 26, 1948, were separate and distinct from the obligation satisfied by the said policy and relate to other matters and the obtaining of the said policy in no way impaired the obligations assumed by the plaintiffs under certain agreements, including the supplemental agreement allegedly of January 26, 1948, and the said agreements required the plaintiffs to reimburse the defendant Southern Pacific Company for expenses incurred as a result of damages caused by the plaintiffs' operations and for which expenses the defendant Southern Pacific Company here counterclaims and said reimbursement was to be without credit to or offset of any sort for the said policy.

c. The said policy was required by the said construction contract which contract required insurance policy to conform to the requirements of Works Program General Memorandum No. 32, signed by the Chief of the Bureau of Public Roads and dated January 27, 1937, and such requirements were generally applicable to all highway construction contracts entered into by the said U. S. Bureau of Public Roads or by its successor federal agencies

since that date in regard to insurance protection in connection with certain projects involving railroads and here said policy issued by the answering defendant and referred to by the plaintiffs in their contention 2 conformed to the requirements stated in the said memorandum.

d. Said agreements referred to in paragraph B above and in particular the said agreement allegedly first agreed to on January 26, 1948, were not generally applicable to all highway construction contracts entered into by the said U. S. Bureau of Public Roads or its successor federal agencies involving railroads to which said General Memorandum No. 32 was applicable but said agreements were specially provided for in order to reimburse the defendant Southern Pacific Company for repair work on account of the anticipated damage to the said defendant's property as a result of special terrain and other conditions where the said highway was to be constructed.

e. Said supplemental agreement which plaintiffs contend was entered into January 26, 1948, was in fact set out in "Special Provisions, Project 24-A2," which were a part of the said construction contract entered into by the plaintiffs with the United States and the said special provisions required the plaintiffs to enter into a written agreement with the defendant Southern Pacific Company which the plaintiffs did on July 2, 1947, but the said parties through inadvertence or otherwise neglected to include the final paragraph of the required contract

until January 26, 1948, but the plaintiffs upon the award of the said construction contract became obliged to perform all of the obligations contained in the said required agreement with the defendant Southern Pacific Company irrespective of whether or not the plaintiffs and defendant Southern Pacific Company did in fact formally enter such an agreement since the said defendant Southern Pacific Company was a beneficiary of the said agreement contained in the said construction contract entered into by the plaintiffs and the United States and, further, the plaintiffs cannot take any advantage from the fact that they wrongfully neglected to carry out the obligation imposed by the said construction contract to enter the whole of the said agreement with the said defendant Southern Pacific Company within a reasonable time after the award of the said construction contract and said wrongful omission was duly corrected at the request of the United States Public Roads Administration, an agency of the United States supervising the construction of the said highway and further prior to January 26, 1948, the plaintiffs and the said defendant Southern Pacific Company had in fact agreed to provision formally entered into on that said date.

3. The answering defendant denies that plaintiffs had no liability to the said defendant Southern Pacific Company for the damage alleged in the counterclaim of the said defendant and contends that the plaintiffs were in fact liable to the said defendant

for wilfully and deliberately damaging the property of the said defendant as a necessary and contemplated result of constructing the said highway in the location required by the plaintiffs said construction contract with the United States and said construction contract required the plaintiffs in their said bid prices to allow for such damage to the property of said defendant and the plaintiffs did so allow and the said insurance policy in no case covers liability imposed upon the plaintiffs by law but only liability imposed by law on the said insured Southern Pacific Company and any of said damage was not caused by "accident."

4. In any case, since the defendant Hartford's liability is only as an insurer, its liability is only secondary and derived, therefore, the defendant Hartford could not be liable unless the plaintiffs were liable primarily.

Contentions of Southern Pacific Company

1. It is the contention of defendant Southern Pacific Company that all the work performed and material furnished by plaintiffs were work and materials which the plaintiffs were obligated to perform or to pay for by reason of the contracts between plaintiffs and Southern Pacific Company.

2. Plaintiffs' operations were negligently or intentionally conducted and the damages sustained by Southern Pacific Company were occasioned solely and proximately by the aforesaid conduct on the part of the plaintiffs.

(a) As a corollary to contention No. 2 it is the position of defendant Southern Pacific Company that by reason of blasting by the plaintiffs, absolute liability is imposed regardless of whether the damage resulted from the negligent or intentional conduct on the part of the plaintiffs.

3. The damages sustained by defendant Southern Pacific Company were within the risks insured against by the policy of insurance procured by plaintiffs with Hartford Accident & Indemnity Company which, by the terms of said policy, was obligated to defend the present action on behalf of Southern Pacific Company and to pay the claims of plaintiffs.

(a) As a corollary to contention No. 3, it is the position of defendant Southern Pacific Company that Hartford Accident & Indemnity Company had been requested by defendant Southern Pacific Company to defend said action in accordance with the terms of the policy and that by reason of the failure of said Hartford Accident & Indemnity Company so to do there has been a breach of said contract of insurance and that Hartford Accident & Indemnity Company is liable to defendant Southern Pacific Company for all costs and expenses incurred in defending said action and the claims of plaintiffs, together with reasonable attorneys' fees in the amount of \$5,000.

(b) As a further corollary to contention No. 3, it is the position of Southern Pacific Company that

the failure of Hartford Accident & Indemnity Company to defend this action on behalf of Southern Pacific Company is a breach of said policy of insurance and that said Hartford Accident & Indemnity Company is liable to Southern Pacific Company regardless of the ultimate outcome of the instant litigation for its costs and attorneys' fees for defending against plaintiffs' claim in the sum of \$5,000.

4. It is the contention of Southern Pacific Company that in the event Hartford Accident & Indemnity Company is not liable to Southern Pacific Company under said policy of insurance, then the plaintiffs have breached their agreement with Southern Pacific Company by failing to procure the type of insurance which would protect Southern Pacific Company as required by said contract.

(a) As a corollary to contention No. 4, it is the position of Southern Pacific Company that in the event Hartford Accident & Indemnity Company is not liable to Southern Pacific Company under the said policy of insurance and in the further event that plaintiffs have not breached their contract by failing to procure the type of insurance which would protect the Southern Pacific Company as required by the contract between plaintiffs and Southern Pacific Company, then and in that event it is the position of Southern Pacific Company that it is a third party beneficiary under the contract between plaintiffs and the United States Government

(Public Roads Administration), which said contract requires that plaintiffs furnish adequate insurance coverage to defendant Southern Pacific Company to protect it against the damages which plaintiffs seek.

5. It is the contention of defendant Southern Pacific Company that Hartford Accident & Indemnity Company is bound and required by the terms of its policy issued to Southern Pacific Company and the Western Union Telegraph Company, policy No. CL-43726, to pay directly to Southern Pacific Company the amount of its damages as aforesaid and because of the failure of Hartford Accident & Indemnity Company to pay said damages, defendant Southern Pacific Company is entitled in the alternative to recover said damages from said Hartford Accident & Indemnity Company, together with all costs, disbursements and expenses, including reasonable attorneys' fees in the sum of \$2,500.

6. It is the contention of Southern Pacific Company as set forth in its counterclaim that it was damaged in the sum of \$8,762.16 by way of expenses incurred in repairing damage to its roadbed, ballast, ties and track and delay to trains (by order of June 2, 1953, W. Bishop) and that plaintiffs are obligated to pay this amount to the Southern Pacific Company.

Further Contentions of Defendant Hartford Accident and Indemnity Company to Contentions of Co-Defendant Southern Pacific Company.

1. The Hartford Accident and Indemnity Company denies that it has any liability to the Southern Pacific Company under either of the policies of insurance mentioned.

2. The Hartford agrees with the contention made by the Defendant Southern Pacific Company that the work performed and materials furnished by plaintiffs was all done pursuant to contracts between plaintiffs and Southern Pacific Company and for which the plaintiffs were expressly obligated to perform and to pay for.

3. The Hartford denies it has any obligation to defendant Southern Pacific Company for attorney fees with respect to either of the policies referred to.

4. The Hartford admits that it was requested by Defendant Southern Pacific Company to defend the original action filed against it herein and that it refused to do so on the grounds that it had no liability. The Hartford contends that the entire matter was one arising out of contract between the Southern Pacific Company and the plaintiffs for which the plaintiffs are liable to the Southern Pacific under their contractual obligation, and that there is no question of insurance involved. That the main action by the plaintiffs against the **Southern Pacific** and the Southern Pacific's counterclaim against the plaintiffs are direct contractual obligations by them and not covered by the policy.

Issues to Be Determined

1. For what items of damage were the plaintiffs liable to the defendant Southern Pacific?

2. As to those items for which the plaintiffs were liable, was their liability for said damages by reason of an obligation imposed by law, irrespective of contract, or by reason only of a liability assumed by the plaintiffs in a contract or contracts?

3. If the plaintiffs' liability for said damage was only by reason of a liability assumed by contract were the contract or contracts by which such liability was assumed easement agreements or a part of an easement agreement within the meaning of the phrase easement agreement as contained within the meaning of the insurance policy, plaintiffs' exhibit ...

4. On April 1, 1948, did the defendant Hartford insure the plaintiffs against all liability caused by accident and assumed by the plaintiffs by contract and occurring thereafter?

5. If the insurance policy, plaintiffs' exhibit . . . , did not insure against liability assumed by contract, was this due to the mutual mistake of the plaintiffs and the defendant Hartford and did said parties intend to insure against all liability assumed by contract and should the insurance policy, plaintiffs' exhibit . . . , be reformed accordingly?

6. Was the damage to the property of the Southern Pacific for which the plaintiffs claim reimbursement and for which defendant Southern Pa-

cific claims reimbursement in its counterclaim damaged by "accident" as that word is used in the insurance policies (plaintiffs' Exhibit ..)?

6a. Was the damage to the property of the Southern Pacific done by the plaintiffs caused by reason of the plaintiffs' negligence, intentional acts, or by acts for which the plaintiffs would be held liable in law absolutely without regard to any fault?

6b. Were all or part of the items of damages claimed by the plaintiffs and the defendant Southern Pacific operational in character, reasonably foreseeable and within the contemplation of the parties when the plaintiffs entered into their contracts for the construction work? (Plaintiffs contend this issue is irrelevant.)

7. Was notice for said damage given by the plaintiffs to the defendant Hartford as required by the terms of Hartford's policy of insurance and if not, did defendant Hartford waive the giving of such notice?

8. Did the defendant Hartford actually have reasonable notice of said damage?

9. Did the defendant Hartford waive that provision of the policy, plaintiffs' exhibit .., that no action lies against the defendant Hartford until final judgment against the plaintiffs has been had or by agreement of the defendant by the defendant Hartford's denial that it was obligated to pay for said damage?

9a. Are the plaintiffs by their acts and conducts with respect to all or part of the items of damages claimed estopped from bringing this action against the defendant Hartford?

9b. Have the plaintiffs waived any claim for any or all of the items of damages in which they might otherwise have had?

9c. Did the plaintiffs violate the terms and conditions of said policy of insurance in the manner specified in defendant Hartford's contentions?

9d. Did the plaintiffs make voluntary payment for any or all of the items of damage claimed and without the approval and consent of defendant Hartford?

9e. Did plaintiffs receive extra compensation under their contract to cover the expense of protecting against the items of damage in question? (Plaintiffs contend this issue is irrelevant.)

9f. Did plaintiffs receive extra compensation under the contract to cover the expense of repairing the items of damage, some of which they are now claiming? (Plaintiffs contend this issue is irrelevant.)

9g. Did the plaintiffs and Southern Pacific enter into an agreement whereby the plaintiffs undertook at their own cost and expense to repair all or part of the items of damage claimed, and if so was this done without the consent and approval of the defendant Hartford?

9h. Did plaintiffs under their contracts with the government and the defendant Southern Pacific assume responsibility for the items of damage claimed for and agree to pay defendant Southern Pacific Company for such items of damage. (Plaintiffs contend this issue is irrelevant.)

10. Did the plaintiffs perform some repair work on the property of the defendant Southern Pacific for which the plaintiffs were not liable and is the defendant Southern Pacific liable to the plaintiffs for the reasonable cost of said repairs?

11. Were the plaintiffs liable to the defendant Southern Pacific for repairs alleged to be performed by the defendant Southern Pacific in their counterclaim, and, if so, is the defendant Hartford obligated to the plaintiffs therefor by reason of insurance policies, plaintiffs exhibits Nos. . . and . . . ?

12. Is the policy of insurance naming the defendant Southern Pacific Company as named assured, plaintiffs' exhibit . . . , an agreement by the defendant Hartford to pay to the defendant Southern Pacific for any damage done to the defendant Southern Pacific for which the plaintiffs are liable by reason of their contract with the defendant Southern Pacific and does said policy render the defendant Hartford primarily liable to the defendant Southern Pacific and the plaintiffs only secondarily liable for said damage?

13. Were the plaintiffs in repairing the damage to the property of the Southern Pacific Company

performing the work for the account of the defendant Hartford in fulfillment of the defendant Hartford's obligation under said policy of insurance naming the Southern Pacific the named assured, plaintiffs' exhibit . . . ?

14. If said policy of insurance naming the Southern Pacific as named assured, plaintiffs' exhibit . . ., does not provide as plaintiffs contend above, was the failure to so provide one made by mutual mistake of the defendant Hartford and the plaintiffs, and, if so, should said policy be reformed to express the intention of the parties as set out in plaintiffs' contention above?

15. Is the defendant Hartford liable to the plaintiffs for reasonable attorneys' fees in prosecuting this action and in defending the counterclaim inserted by the defendant Southern Pacific?

16. Were the damages sustained by Southern Pacific Company occasioned by the negligence or by the intentional conduct of the plaintiffs?

17. Were the damages sustained by defendant Southern Pacific Company within the risk insured against by the policy of insurance procured by plaintiffs with defendant Hartford?

18. Was defendant Hartford obligated to defend the present action on behalf of defendant Southern Pacific Company and to pay the claims, if any, of the plaintiffs?

19. Has there been a breach of said contract of

insurance by defendant Hartford and is that company liable to defendant Southern Pacific Company for all costs and expenses incurred in defending said action and the claims of plaintiffs, together with reasonable attorneys' fees?

20. Has there been a breach of said policy of insurance by defendant Hartford and is that company liable to defendant Southern Pacific Company regardless of the ultimate outcome of plaintiffs' claim against defendant Southern Pacific Company for defendant Southern Pacific Company's costs and attorneys' fees incurred in defending plaintiffs' claims?

21. Have plaintiffs breached their agreement with Southern Pacific Company by failing to procure the type of insurance which would protect that defendant as required by the contract between plaintiffs and Southern Pacific Company?

22. Is Southern Pacific Company a third party beneficiary under the contract between plaintiffs and the United States of America (Public Roads Administration)?

23. Did the contract between plaintiffs and the United States of America (Public Roads Administration) require plaintiffs to furnish adequate insurance coverage to protect defendant Southern Pacific Company against the damages which plaintiffs now seek to recover from defendant Southern Pacific Company?

24. Are plaintiffs obligated to pay defendant's damages and expenses incurred in repairing damage to its roadbed, ballast, ties and tracks?

25. Is defendant Hartford bound and required by the terms of its policy issued to Southern Pacific Company to pay directly to defendant Southern Pacific Company the amount of its damages?

26. Is defendant Southern Pacific Company entitled by reason of the failure of defendant Hartford to pay its damages to recover said damages from defendant Hartford, together with all costs, disbursements and expenses, including reasonable attorneys' fees?

Exhibits

The following exhibits have been displayed by the parties, respectively, and are enumerated below. No further identification or authentication will be required at the trial:

Plaintiffs' Exhibits

1. Proposal and contract, Oregon Forest Highway Project 24-A2.
2. Insurance policy, LCX2708 with endorsements, Kuckenberg Construction Company, assured.
3. Insurance policy, CL43726 with endorsements, Southern Pacific and Western Union assured.
4. Contract between Southern Pacific and Kuckenberg Construction Co., dated 2 July, 1947.

5. Supplemental agreement between Southern Pacific and Kuckenberg Construction, dated 26 January, 1948.
6. Copy of contract between Southern Pacific and State of Oregon, dated 28 May, 1947.
7. Letter West to Krill, November 3, 1947.
8. Letter Krill to West, November 12, 1947.
9. Copy of telegram Krill to West, December 22, 1947.
10. Letter West to Krill, December 22, 1947.
11. Letter Forbes to Baldwin, April 12, 1948.
12. Forbes' report, dated May 10, 1948, and transmitted by letter April 12, 1948.
13. Letter Krill to Posey, May 15, 1948.
14. Letter Krill to Posey, July 7, 1948.
15. Letter Krill to Hitchings, April 5, 1948.
16. Letter Jewett, Barton, Leavy & Kern to Kuckenberg Construction Co., April 15, 1948.
17. Deposition of Louis J. Krill.
18. Plans for contract 24-A2.
19. Plans for contract 24-A4, B4.
20. Plans for contract 24-A3.
21. Plans for contract 24-B3, Unit 1.
22. Job diary, October 13, first entry.
23. Lind's diary, January 2, first entry.

24. Foreman's time reports.
25. a-g Large photos.
26. a-i Small photos.

The issue of the amount of the damages claimed by the plaintiffs and the defendant Southern Pacific will be reserved until after such time as the Court shall have entered its decision on the questions of what parties, if any, are liable for said damages, and on the question of the amount of the damages the parties may, if they desire, present a supplemental pre-trial order.

The parties hereto agree to the foregoing pre-trial order, and the Court being fully advised in the premises:

Now Orders that the foregoing pre-trial order shall not be amended except by consent of both parties or to prevent manifest injustice; and

It Is Further Ordered that the pre-trial order supersedes all pleadings; and

It Is Further Ordered that upon trial of this cause no proof shall be required as to matters of fact hereinabove specifically found to be admitted, but that proof upon the issues of fact and law between plaintiff and defendant hereinabove stated shall be had.

Dated this 1st day of June, 1953.

/s/ GUS J. SOLOMON,
Judge.

Approved:

/s/ ARNO H. DENECKE,
Of Attorneys for Defendant
Southern Pacific Company.

/s/ JOHN GORDON GEARIN,
Of Attorneys for Defendant
Southern Pacific Company.

/s/ JAMES ARTHUR POWERS,
Of Attorneys for Defendant Hartford Accident &
Indemnity Co.

[Endorsed]: Filed June 1, 1953.

(Copy)

[Title of District Court and Cause.]

ORAL OPINION

August 6, 1953

I have read and considered the briefs and the cases therein cited filed by both plaintiffs and the defendant Hartford Accident & Indemnity Company on the issue of whether the damages sought to be recovered were "caused by accident" within the meaning of the policy of liability insurance issued by such defendant.

I am now more convinced than ever that the damages in any of the three categories enumerated by plaintiffs for which recovery is sought were operational and not accidental within the meaning of the defendant Hartford's policy or as those terms are popularly understood.

Defendant Hartford may, therefore, submit Findings of Fact, Conclusions of Law and a Judgment in its favor on this phase of the case.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-entitled action came on for final pre-trial on June 1, 1953, and for trial on June 1 and 2, 1953, on the issue as to whether or not the items of damage to property of defendant Southern Pacific Company following the road-building operations of plaintiffs occurred by "accident" within the coverage of certain insurance policies issued by defendant Hartford Accident and Indemnity Company to plaintiffs and to defendant Southern Pacific Company. Plaintiffs appeared by and through Arno H. Denecke, one of their attorneys. Defendant Hartford Accident and Indemnity Company appeared by and through James Arthur Powers, its attorney. Defendant Southern Pacific Company appeared by and through John Gordon Gearin, one of its attorneys.

And now the Court, having heard and considered the evidence in the matters above set forth, including the exhibits of the parties, and the statements and written briefs of counsel and having rendered its oral opinion on August 6, 1953, and being fully advised in the premises, does hereby make its separate Findings of Fact and Conclusions of Law:

Findings of Fact

I.

At all times herein concerned plaintiffs Harry A. Kuckenberg, Harriet Kuckenberg and Lawrence

Kuckenberg were and are co-partners doing business as Kuckenberg Construction Co. with their office and principal place of business in Multnomah County, Oregon. At all of said times plaintiffs were and are now citizens of the State of Oregon.

II.

At all times herein concerned defendant Hartford Accident & Indemnity Company was and is now a corporation duly organized and existing under and by virtue of the laws of the State of Connecticut and was and is engaged in the insurance business in the State of Oregon.

III.

At all times herein concerned and to and including October 16, 1947, defendant Southern Pacific Company was a corporation duly organized and existing under and by virtue of the laws of the State of Kentucky and authorized to do business and doing business in the State of Oregon as a railroad company. On September 3, 1947, all of the assets of Southern Pacific Company, a Kentucky corporation, were transferred to Southern Pacific Company, a Delaware corporation. On October 16, 1947, Southern Pacific Company, the Kentucky corporation, withdrew from business in the State of Oregon. On December 15, 1947, Southern Pacific Company, the Kentucky corporation, was dissolved. Since September 3, 1947, and at all times referred to in the complaint subsequent thereto, the business of Southern Pacific Company, the Kentucky corporation, has been and is being conducted by Southern

Pacific Company, the Delaware corporation. Southern Pacific Company is regarded as being one corporation during all of the times herein concerned.

IV.

The amount in controversy exceeds, exclusive of interests and costs, the sum of \$3,000.00.

V.

On or about May 7, 1947, plaintiffs entered into various contracts with the United States of America whereby plaintiffs undertook to and did construct portions of a public highway, sometimes known as the North Santiam Highway, in Marion County, Oregon. Said contract, being Oregon Forest Highway Project 24-A2, contained among other provisions the following:

Proposal and Contract, Oregon Forest Highway Project 24-A2 Public Convenience and Safety (p. D-6).

“Between Stations 691 ± 85 and 714 ± 50, Unit B, the roadway excavation involved is in such close proximity to the railway company tracks that some interference with the continuous operation of the railroad and possible damage to its facilities would seem to be unavoidable. At this or any other points where similar conditions exist the contractor shall keep the engineer and the railway company fully informed in advance of his plans and shall cooperate in their modification and execution to the end that such unavoidable interference and/or

damage may be held to a minimum. Railroad operation shall be restored at the earliest practicable moment either by temporary shoofly construction or by restoration of the now existing condition. Any damages or costs involved which result from such construction operations shall be at the expense and responsibility of the contractor.”

Protection of Railroad and Existing Highway During Construction (p. D-9) :

“Construction shall be performed by methods which will result in the least possible damage to the adjacent railroad and to the existing road. Blasting shall be done in such manner that the materials will, so far as practicable, remain in place within the proposed road prism. Any materials or debris falling onto either facility shall be removed, and any damage to the roadbed or track immediately corrected. Broken rail, damaged ties and fouled ballast shall be replaced in a workmanlike manner. A stock of ties, rail, telephone and telegraph line and supplementary supplies shall be kept in stock on the project at all times to facilitate repairs.

“The contract unit price shall include full compensation for all special work necessary in blasting and excavation of the material to prevent damage to the railroad and any work necessary in removing debris unavoidably dropped on the roadbeds of the railroad and existing highway and for the correction of any damages to those facilities or to the telephone and telegraph lines.”

VI.

On July 2, 1947, plaintiffs entered into a contract with the defendant Southern Pacific Company in respect to certain required insurance and certain construction work involved in this controversy as was expressly required by plaintiffs' said construction contract with the United States of America. The said requirement in the plaintiffs' said construction contract with the United States was in turn expressly required by a prior agreement entered into by the Southern Pacific Company and the State of Oregon, acting by and through its State Highway Commission, dated May 28, 1947, relating to the acquisition by the State of the right to construct highway slopes upon and along certain portions of the said company's right of way in Marion County, Oregon. Said Commission in turn contracted with the United States Public Roads Administration, an agency of the United States, for the construction of the said highway, and said Administration contracted with the plaintiffs, the contractor, on the behalf of the United States.

VII.

As further required by said construction contract with the United States, plaintiffs on January 26, 1948, formally entered into a contract with the defendant Southern Pacific Company in regard to protecting certain property from damage as a result of said construction work and providing for the reimbursement of the said railroad for certain repair work which said railroad might be required to do

upon its property as a result of plaintiffs' operations. Said contract and that entered into on July 2, 1947, have at all times been considered by the parties hereto as one contract covering the period commencing July 2, 1947. Said contract among other provisions contained the following:

Proposal and Contract, Oregon Forest Highway Project 24-A2 Agreement with Southern Pacific Company (p. D-4):

“Contractor shall protect Railroad against damage to telegraph, telephone and signal lines (including telegraph and telephone lines of The Western Union Telegraph Company, located upon railroad right of way), roadbed, ballast, ties, and/or track. Any work of this character which railroad may be required to do on account of or for the purpose of accommodating the work of Contractor shall be done by Railroad at the expense of Contractor, and Contractor shall reimburse Railroad upon rendition of bills therefor for all expense incurred by it in: (a) repairing damage to railroad structures, telephone, telegraph and signal lines (including telephone and telegraph lines of The Western Union Telegraph Company located upon Railroad property), and (b) repairing damage to roadbed, ballast, ties and/or track.”

VIII.

Pursuant to the requirements of the said contract with defendant Southern Pacific Company referred

to in paragraphs VI and VII above, plaintiffs contracted with and did receive from the defendant Hartford Accident & Indemnity Company a bodily injury and property damage liability insurance policy, No. LCX-2708, effective April 1, 1947, as modified by certain endorsements to the said policy effective on that date and other endorsements effective subsequently.

Said policy contained among other provisions an endorsement dated March 28, 1947, and entitled, "Property Damage Other Than Automobile," and containing among its other provisions the following language setting forth the obligation of defendant Hartford Accident & Indemnity Company to plaintiffs:

"To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law, or assumed by him under contract as defined in the policy for damages because of injuries to or destruction of property, including loss of use thereof, caused by accident, * * *"

Effective on July 29, 1948, the defendant Hartford Accident & Indemnity Company duly and properly cancelled the said policy as provided for therein.

IX.

Defendant Hartford Accident & Indemnity Company issued to defendant Southern Pacific Company and to Western Union Telegraph Company, at the instance and at the cost of plaintiffs, a policy of

insurance No. CL-43726, which policy was in effect May 14, 1947, through May 14, 1948. Said policy bore endorsement No. 1, effective May 14, 1947, and endorsement No. 2, effective September 30, 1947. Said Defendant Hartford thereafter issued its continuation certificate to said policy and its endorsements for the period from May 14, 1948, to May 14, 1949.

Said policy among other provisions contained the following insuring agreement:

“To pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon the Insured by law for damages because of injury to or the destruction of property, caused by accident * * *”

Endorsement No. 1 thereto provided that the term property should include property of and in the custody of defendant Southern Pacific Company and Western Union Telegraph Company as well as other property.

X.

Plaintiffs in the performance of said contract worked in close proximity to the railroad line of defendant Southern Pacific Company. From about June 2, 1947, to about July 29, 1948, property of Southern Pacific Company was damaged on numerous occasions as a result of plaintiff's road-construction operations. After the completion of said highway, plaintiffs engaged in certain recondition-

ing work on said railroad from about April 4, 1949, to about May 6, 1949.

XI.

Defendant Hartford Accident & Indemnity Company has denied any liability to plaintiffs under the terms of said policies of insurance referred to in paragraphs VIII and IX above. Said defendant has further refused to pay plaintiffs for any amounts expended by plaintiffs for the repair of said damage. Said defendant has refused to assume the defense of certain claims asserted by defendant Southern Pacific Company against defendant Hartford Accident & Indemnity Company with respect to said damage.

XII.

Defendant Hartford has denied any liability to defendant Southern Pacific Company under its policy referred to in paragraph VIII above for damages resulting from the operations of plaintiffs in constructing said road and has refused to assume the defense of certain claims asserted against defendant Southern Pacific Company by plaintiffs arising out of plaintiffs' road-building operations herein involved.

XIII.

In the areas where damages to property of defendant Southern Pacific Company occurred during the period of said road construction by plaintiffs, plaintiffs worked in close proximity to the railroad line of said defendant, the distance between said

line and plaintiffs' operations varying from about 20 feet to about 600 feet. In all instances, plaintiffs' area of operations when not immediately adjacent to said railroad line were at a higher level on a mountainside above said railroad line of said defendant. Plaintiff conducted continuing blasting operations of various intensity during the course of said road construction.

The damages to the property of said defendant occurred as a result of said blasting operations in almost all instances. In the other instances, the damages to said railroad line were the result of earth-moving or tree-cutting operations by plaintiffs. The items of damage claimed for injury to the property here involved was the reasonably anticipated, ordinary and expected result of plaintiff's operations under the circumstances herein presented and did not result from "accident."

XIV.

Plaintiffs alleged in the alternative that their claims against Southern Pacific occurred by accident. The Court finds said claims did not occur by accident within the meaning of the terms of said policy of insurance issued by defendant Hartford Accident and Indemnity Company to Southern Pacific Company; that said company was nonetheless entitled to have said claims defended.

XV.

Defendant Southern Pacific Company made timely demand upon defendant Hartford to defend

plaintiffs' action against it, but said demand was rejected and refused by Hartford Accident and Indemnity Company.

XVI.

The policy of insurance issued by defendant Hartford to Southern Pacific Company provides among other things:

“Insuring Agreement

“III. Defense, Settlement, Supplementary Payments.

“It is further agreed that as respects insurance afforded by this policy the company shall

“(a) defend in his name and behalf any suit against the insured alleging such injury and seeking damages on account thereof, even if such suit is groundless, false or fraudulent * * *”

XVII.

The reasonable value of attorneys' fees incurred by Southern Pacific Company in defending the claims of plaintiffs was and is the sum of \$1500.00 and Southern Pacific Company incurred additional expenses in defending said claims by way of costs and disbursements in the reasonable sum of \$163.71.

Conclusions of Law

1. The damages and injuries to the track and roadbed of the railroad line of defendant Southern Pacific Company were not caused by accident within the meaning of the terms contained in the various

policies of insurance among and between defendant Hartford Accident and Indemnity Company and plaintiffs, defendant Southern Pacific Company and Western Union Telegraph Company referred to in paragraph VIII of Findings of Fact herein.

2. Defendant Hartford Accident and Indemnity Company is not liable to plaintiffs to pay for the damages and injuries to property of defendant Southern Pacific Company resulting from plaintiffs' road-building operations here involved.

3. Defendant Hartford Accident and Indemnity Company is not required under said policies of insurance to appear and defend on behalf of plaintiffs against actions or claims brought against plaintiffs by defendant Southern Pacific Company for damages resulting from plaintiffs' road-building operations involved herein.

4. Defendant Hartford Accident and Indemnity Company is not liable under said policies of insurance to defendant Southern Pacific Company to pay for any of the damages and injuries to property of said defendant occurring as a result of plaintiffs' road-building operations herein involved.

5. Defendant Hartford is liable under said policies of insurance to appear and defend defendant Southern Pacific Company against plaintiffs' claims against said defendant growing out of or resulting from plaintiffs' road-building operations here involved.

6. Defendant Hartford is liable to defendant Southern Pacific Company for all costs and attorneys' fees incurred by said defendant in defending plaintiffs' claims here involved.

Done at Portland, Oregon this 11th day of March, 1954.

/s/ GUS J. SOLOMON,
Judge.

[Endorsed]: Filed March 11, 1954.

In the District Court of the United States
for the District of Oregon

Civil No. 5092

HENRY A. KUCKENBERG, HARRIET KUCK-
ENBERG and LAWRENCE KUCKENBERG,
dba KUCKENBERG CONSTRUCTION COM-
PANY,

Plaintiffs,

vs.

HARTFORD ACCIDENT & INDEMNITY COM-
PANY, a Corporation, and SOUTHERN PA-
CIFIC COMPANY, a Corporation,

Defendants.

JUDGMENT

This cause came on regularly for trial on June 1 and 2, 1953, before the Honorable Gus J. Solomon, Judge of the above entitled court, plaintiffs appearing by Arno H. Denecke, one of its attorneys, defendant Hartford Accident & Indemnity Company

by James Arthur Powers, its attorney, and defendant Southern Pacific Company by John Gordon Gearin, one of its attorneys. The Court heard and considered the evidence of the parties, including exhibits admitted herein, and the argument and written briefs submitted by counsel. Pursuant thereto, the Court has on this date made and entered findings of fact and conclusions of law, and now, based thereon, it is hereby

Considered, Ordered and Adjudged that plaintiffs take nothing by this action against defendant Hartford Accident & Indemnity Company and judgment herein is entered in favor of said defendant against plaintiffs, and it is further

Considered, Ordered and Adjudged that defendant Southern Pacific Company take nothing on its counterclaim against defendant Hartford Accident & Indemnity Company and judgment herein is entered against defendant Southern Pacific Company in favor of defendant Hartford Accident & Indemnity Company on said counterclaim, and it is further

Considered, Ordered and Adjudged that defendant Southern Pacific Company have and recover of and from defendant Hartford Accident & Indemnity Company reasonable attorneys' fees in the sum of \$1500.00, together with its costs and disbursements incurred herein in the sum of \$163.71, and it is further

Considered, Ordered and Adjudged that defendant Hartford Accident & Indemnity Company have

and recover of plaintiffs its costs and disbursements incurred herein, taxed and allowed in the sum of \$., and it is further

Considered, Ordered and Adjudged that there be reserved for further determination the respective claims of plaintiffs against Southern Pacific Company and the counterclaim of said defendant against the plaintiffs.

Done at Portland, Oregon, this 11th day of March, 1954.

/s/ GUS J. SOLOMON,
Judge.

[Endorsed]: Filed and entered March 11, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the plaintiffs Henry A. Kuckenberg, Harriet Kuckenberg, and Lawrence Kuckenberg, d.b.a. Kuckenberg Construction Co., plaintiffs, hereby appeal to the United States Court of Appeals for the Ninth Circuit from that part of the final judgment entered in this case on the 11th day of March, 1954 which is as follows:

“It is hereby

“Considered, Ordered and Adjudged that plaintiffs take nothing by this action against defendant Hartford Accident & Indemnity Company and judgment herein is entered in favor of said defendant against plaintiffs, and it is further * * *

“Considered, Ordered and Adjudged that defend-

ant Hartford Accident & Indemnity Company have and recover of plaintiffs its costs and disbursements incurred herein, taxed and allowed in the sum of \$....., * * *”

Dated this 9th day of April, 1954.

MAUTZ, SOUTHER, SPAULD-
ING, DENECKE & KINSEY,

By /s/ ARNO H. DENECKE,
Of Attorneys for Plaintiffs.

[Endorsed]: Filed April 9, 1954.

[Title of District Court and Cause.]

UNDERTAKING ON APPEAL

Know All Men by These Presents, That we, Henry A. Kuckenberg, Harriet Kuckenberg and Lawrence Kuckenberg, d.b.a. Kuckenberg Construction Co., plaintiffs, as principals, and Glens Falls Indemnity Company, a corporation, as surety, are held and firmly bound unto Hartford Accident & Indemnity Company, a corporation, defendant, in the full and just sum of Two Hundred Fifty Dollars (\$250.00) to be paid the said Hartford Accident & Indemnity Company, or its assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally by these presents. Sealed with our seals and dated this 9th day of April, 1954.

Whereas, on the 11th day of March, 1954, in the United States District Court for the District of Oregon in an action pending in said Court between

said plaintiffs and the said defendant, among others, rendered a judgment for the defendant and against the plaintiffs and for the defendant's costs herein incurred, the said plaintiffs having filed in said Court a Notice of Appeal to reverse the judgment in the aforesaid action by appeal to the United States Court of Appeals for the Ninth Circuit.

Now, the Condition of the above obligation is such that if said plaintiffs shall pay the costs if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if judgement is modified, then the above obligation to be void; or else to remain in full force and virtue.

HENRY A. KUCKENBERG, HARRIET KUCKENBERG and LAWRENCE KUCKENBERG, d.b.a. KUCKENBERG CONSTRUCTION CO.

By /s/ ARNO H. DENECKE,
One of Their Attorneys,
Principals.

[Seal] GLENS FALLS INDEMNITY
COMPANY,

By /s/ J. STEWART LEAVY,
Attorney-in-Fact,
Surety.

Countersigned:

JEWETT, BARTON, LEAVY
AND KERN,

/s/ J. G. GEARIN.

[Endorsed]: Filed April 9, 1954.

United States District Court
District of Oregon

Civil No. 5092

HENRY A. KUCKENBERG, HARRIET KUCK-
ENBERG and LAWRENCE KUCKEN-
BERG, d.b.a. KUCKENBERG CONSTRUC-
TION CO.,

Plaintiffs,

vs.

HARTFORD ACCIDENT & INDEMNITY COM-
PANY, a Corporation, and SOUTHERN
PACIFIC COMPANY, a Corporation,

Defendants.

Portland, Oregon, June 1, 1953—2:00 P.M.

Before: Honorable Gus J. Solomon,
Judge.

Appearances:

ARNO H. DENECKE,
Of Attorneys for Plaintiff.JAMES ARTHUR POWERS,
Of Attorneys for Defendant Hartford
Accident & Indemnity Company.JOHN GORDON GEARIN,
Of Attorneys for Defendant Southern
Pacific Company.

TRANSCRIPT OF TESTIMONY AND
PROCEEDINGS

(The above entitled cause coming duly on for trial, and counsel for the respective parties having made their opening statements, the following proceedings were had.)

Mr. Denecke: I will call Mr. Lind.

HILDING F. LIND

a witness produced in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Denecke:

Q. Mr. Lind, you do work in construction, heavy construction; is that correct? A. Yes, sir.

Q. In 1947 and 1948 you were the superintendent for Kuckenberg Construction Company on the North Santiam job? A. That is correct.

Q. What is your work now, Mr. Lind?

A. Well, I am still in construction.

Q. Who do you work for?

A. Well, I am with C. J. Montag and Sons.

Q. How long have you been working for them?

A. Well, since I left Kuckenberg I have been with them, a year now.

Q. When did you first go to look over this job on the North Santiam?

A. Well, in the spring of 1947, the early spring of 1947.

(Testimony of Hilding F. Lind.)

Q. Do you recall how many contracts there were covering the work that your employer eventually received? A. Four.

Q. With reference to 24-A2, do you have that one in mind? [3*]

A. Unless I am mistaken, the first one from Niagara east, A-2/B-2, I think it is, 24-A2/B-2.

Q. I hand you Plaintiff's Exhibit 18, pre-trial exhibit, which is plans for 24-A2, and after looking at that— A. Yes, that is it.

Q. On that particular contract, Mr. Lind, would you state generally what contract it was contracted to do?

A. Well, it was the clearing on the road, the roadbed itself. It was the clearing and the excavation, the culvert and bridges, viaducts, and the sloping and the base material. And then on this particular job was a detour—can I go to length to explain how this thing was?

Q. Yes.

A. There is almost a third of the job in length where this particular section did not interfere or come close to the Southern Pacific railroad track, and then right approximately a third of it that the old road was completely relocated. In other words, by saying it was relocated, it was necessary to construct a detour, and all vehicular traffic was run on this detour, which is the lines of the Southern Pacific Railroad, and that was approximately a third of the job. The last third of the job, why,

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Hilding F. Lind.)

we came off of the railroad track again and back onto the right-of-way of the Bureau or the State Highway Department.

The difference in—when we built the job, and had planned [4] it originally, the first third of the job is pretty much the same as the normal type of work that we did, and where we had no interference at all with traffic, vehicular traffic near the railroad, but also the vehicular traffic because it could be handled without any special detours, but the third section is where the price difference comes in per cubic yard measurement, so it was necessary for a mile and a half to run pilot cars 24 hours a day and to complete a detour on the Southern Pacific tracks.

Also, your traffic had to go through on the detour every 30 minutes, run from each side. Any construction being done above the detour would have to stop and wait while traffic went through. That is where the difference in cost come in this center section.

Q. Mr. Lind, how did the engineers divide up this job? In other words, how did you determine a point on the ground as a point on the chart there? They used stations; did they not?

A. That is right.

Q. Would you explain to the Court, Mr. Lind, generally how the system of stationing works?

A. Well, a station, of course, is a hundred feet. It is just something in an engineering job so that your locations, when you are speaking of a certain

(Testimony of Hilding F. Lind.)

section, that you can locate that easily by a number and the stations. The engineers would give a station of 100 feet. Ten stations would be a [5] thousand feet; 52.80 stations would be a mile.

Q. Am I correct, Mr. Lind, that generally in your work describing where it was and describing various events you would just refer to that in reference to a station; am I correct on that?

A. That is right. I think all engineers and contractors base everything on that.

Q. Mr. Lind, I hand you Plaintiffs' Exhibits 25 and 26 and ask you to look through those photographs and see if you can find one or two which give a pretty good view of the ground covered by this contract 24-A2?

A. This one here is not even on the job. (Indicating photograph.)

Q. I know it.

A. This is at Station 714 approximately. It is about—

Mr. Powers: What is that marked, please?

Mr. Denecke: F. Mr. Lind, perhaps looking at 26(I), is that a fairly comprehensive view of the area covered by this contract?

A. Yes, that is quite true, the old road is there and the new road is above it.

Q. Could you point out on the photograph, Mr. Lind, where is the new road, the old road and the S.P.'s right of way?

A. This is the Santiam River, and as you notice this little slight road here, that is a railroad, a part

(Testimony of Hilding F. Lind.)
of the Southern Pacific Railroad Company here, and this particular place, this [6] is the old highway which is a one-way road with occasional turn-outs here. The new highway is up in here approximately five to eight hundred feet higher than the old road, so, actually, there is a difference here of from here to the railroad track. (Indicating on photograph.)

Mr. Powers: I cannot hear the witness.

The Witness: From the railroad track to the new highway, in this particular case it is probably a thousand feet in this particular picture.

Mr. Powers: You were referring to "I," were you, 26-I?

The Witness: Yes.

Mr. Denecke: That is right.

The Witness: In this particular picture it is a one-way.

Q. (By Mr. Denecke): Could you look through the rest of these, Mr. Lind, and see if there are any others there that describe the job or give a view of the job as a whole rather than individual parts there?

A. Well, this is A-2. We are approximately—I can only go by stations because this is approximately Station 500, and here is where we—about 600 in there. In that particular case your new highway is on the same grade as the railroad, and there would be no damage, if any, in here at all, due to the fact that there was no dynamiting done

(Testimony of Hilding F. Lind.)

here and that we are on the same level as the railroad track. That is what I would call normally ordinary construction work. [7]

The Court: When was this job completed?

The Witness: Well, I think it was in 1949, spring of 1949. This is taken off of the old highway, and in this particular case the old highway is above the new road, and the railroad is down to our left here. I think that is about Station 700.

Q. I will wait, Mr. Lind, until we get to the various parts of it here.

The Court: Was there not a job in that vicinity last year or the year before?

The Witness: No.

Mr. Denecke: Not a road job, your Honor.

The Witness: All work was done that same year, 1949.

The Court: Outside Eugene?

Mr. Denecke: Well, this is in the area between Mill City and, well, Detroit, of course, is the closest, is the construction down there. This is Lookout Dam there—you are correct, your Honor, they are doing a lot of road work there.

Q. How was the road carried on? How did you prepare for the making of the new road?

A. Well, first, of course, clearing the trees, felled and burned, and then the roads are where you could, were pioneered, and the usual construction methods, and then your equipment came in and worked.

(Testimony of Hilding F. Lind.)

Q. When you say the roads were pioneered, what do you mean by that? [8]

A. Oh, by that I mean in the top of some of these cuts you first have to build a road wide enough so as to get your larger grading equipment in, and they are pioneered in around the sides of these cliffs so that you could get in and get to work.

Q. What was the general type of construction that had to be done on this contract? Was it earth, rock or soft rock?

A. Well, it varied. As I said, we had in some sections, the sections were not in the mountains, more or less where the canyon widened out there was the gravel and dirt with some rock that had to be shot. As you reach the proximity of the dam, why, it starts on the upgrade and goes into the mountains there; of course, that is rock, some of it very hard rock.

Q. Mr. Lind, I hand you Exhibit 28 and ask you if you will now state to the Court, taking up these items one by one, how these various elements of damages occurred.

Mr. Powers: This Exhibit 28, I do not remember that right now.

Mr. Denecke: 28 is a statement of events, Mr. Powers, which I sent you a couple of years ago.

Mr. Powers: Is that the list of items you are claiming for?

Mr. Denecke: Prepared by Mr. Lind; that is right.

(Testimony of Hilding F. Lind.)

The Witness: Do you want me to start here?

Q. (By Mr. Denecke): Mr. Lind, it is correct, is it not, that Exhibit 28 is a statement that was prepared on the basis of information supplied by you? [9] A. Yes.

Q. Your information, Mr. Lind, came from your diary—I should say your own check of the time cards of your own people, your diary, and, of course, you were present on the job at all times?

A. Correct.

Q. Referring to August fifth, that is 1947; is it not? A. Yes.

Q. I would prefer, Mr. Lind, that rather than read those that you will just refresh your recollection from what was said at that time and state as——

A. Of Course, I don't remember everything, every incident, you know, now.

Q. I realize that.

A. Well, at Station 680 this is close to Sardine Creek, it is just on the other side of Sardine Creek. Apparently, the rock came down on the track that day. I don't know how much the damages were.

Q. We are not trying to go into that point at this time. A. Yes.

Q. Do you know what caused the rock to come down on the track?

A. Well, any rock before you shoot or anything else, why, you have got to drill holes in it, and then you spring. Commonly in construction work you put a small charge of powder in the hole that you

(Testimony of Hilding F. Lind.)

are going to spring, and you enlarge that by—you enlarge that, depends on the hardness of the rock as to how many times you may have to spring it. You may have to [10] spring it three or four times or maybe twice, and when you do that you shake the ground, cause a vibration, a shaking of the ground within three or four hundred feet of possibly where the hole is.

Well, we were in steep country, and if you are shaking the ground a lot, a log, a rock possibly which has been there for maybe a hundred years, will dislodge and roll downhill and, of course, anything underneath it, if it hits the track it may break it or bend it or it will go down on the highway and block something up so traffic cannot get by.

Now, on August fifth, Station 680, I do not remember this particular rock because we have had lots of them do that, but I have in my diary I was doing some springing, and the rock got dislodged and rolled down on the railroad track, and, of course, it was repaired by us. The time card of the foreman that worked on it is where the expense was originally taken from.

Now, 679, there was no blasting down at that station and, apparently, something caused a rock to roll down the hill. It must have been close to men that were working, but it rolled down the hill, did some damage on the track. Quite often, I might bring into this that even the railroad train, I think the Railroad Company will even admit that, that

(Testimony of Hilding F. Lind.)

the vibration from a train that has been going on passing a certain place would cause a rock ledge to roll down. That is what these [11] maintenance crews have been out there for 25 years, as occasionally taking rock or debris off the right of way that comes down. Of course, in this particular case that we got the job of maintenance of anything that came down regardless of where it came down or how it came down was taken care of by yourself.

The Court: Let me ask a couple questions with reference to one and two. That is for the August fifth and eleventh numbers.

The Witness: Yes.

The Court: Do I understand you correctly that when you blast, by means of drilling, putting the charge in the hole, that you cannot determine any particular mathematical per cent, the amount of rocks that is going to be loosened by that blast?

The Witness: Not entirely, no, you cannot. You can put in—dynamite works by the pounds, as a rule, and you take the textbooks in determining the type of rock it is. It will go all the way to a quarter of a yard a pound as high, and, oh, I have seen rock go as high as a pound and a quarter a yard. That is determined entirely by the type of rock, your Honor. If there are seams or cracks that you cannot see, visible from the surface, maybe in some cases a quarter of a pound would be ample, and half a pound would be too much.

The Court: That is something you cannot tell?

(Testimony of Hilding F. Lind.)

The Witness: You cannot really tell, in other words, there is a certain amount of judgment connected with all of it. [12] Now, we used on that job, our average when we did the job, we figured on about a half a pound a yard, and I think we finished up—I know I went over the costs—and we actually used less dynamite per cubic yard on the job than we had anticipated.

Several factors entered into that. One of them is that the old bridge ran down pretty much the center line of where the new center line of the road is now, and in the old days they used to overshoot an awful lot. They did not have the equipment to move rock material, and they used powder, more of it, and then, naturally, there are a lot of faults that was caused 20 or 25 years ago where rock is jarred much heavier than it should have been.

The Court: Did you visit the location before the job was bid?

The Witness: Yes, sir, I worked within—we had a job previous to this that connected on to this job. I just spent a year in this same location.

The Court: So you knew that there was quite a few seams and faults in the rock that was blasted?

The Witness: A certain amount of them, yes.

The Court: Out of 100 shots a good percentage of them will have results which are not anticipated, is that correct?

The Witness: No, I would not say that it is that correct. No, I would say we moved—to give you an example, we moved close to four and a half

(Testimony of Hilding F. Lind.)

million yards on these jobs, most of that being rock, and of the four and a half million yards [13] that was moved there was probably not over, oh, I would say, twenty thousand yards of that four and a half million that ever didn't go except we didn't expect it. Most of it is not caused by a great quantity of rock. It is caused by a loose rock. In other words, if somebody, as an example, was putting a sewer across the street here and in the near vicinity and there was rocks, they would possibly go entirely around this building without doing any damage at all, but one rock would probably break maybe a picture window that you have here.

The Court: That is something that you cannot determine in advance?

The Witness: You do not control it. That one is an element—you have no control whatsoever over it.

The Court: The theory is to undershoot rather than overshoot to avoid damage?

The Witness: That is right.

The Court: Did you tell me that in connection with the August eleventh occurrence that that may not have been connected with the work at all?

The Witness: That is true. I see here in the note, "no blasting was being done at this location." Now, I would not have put that in there originally because I supported everything by my diary as to where we were working, and we apparently were not shooting there at all.

Now, that may have been caused by, oh, a dozen

(Testimony of Hilding F. Lind.)

different [14] reasons. It may have been caused by springing. It may have been caused by some men walking around and clearing up above the railroad and pulling lumber out and dislodging a big boulder which would roll down the hill and hit a car or hit your railroad track.

The Court: When you say there was no blasting being done at the location, what does that mean, no blasting within a hundred yards or——

The Witness: Oh, no, I would not call it that close. When I say there would be no blasting being done I think, generally I would say within 500 or 600 feet, something like that or anything that might have been caused—I think I would make the difference this way, anything that I thought would be far enough away so that it would not be dislodged by the work they were doing, I would say anything in that area would be blasting in that area.

The Court: Is it true that a shot that is being shot 600 feet away may cause vibrations which would result in a rock loosened?

The Witness: Yes, it could very easily. I have seen it happen many times. I think there has been damage claims collected on jobs where blasting has been done as far as five miles away. I think they have all had experience in that.

The Court: Go ahead, I won't interrupt you.

Q. (By Mr. Denecke): Mr. Lind, when you talk about springing it [15] is a type of blasting, but the only purpose of it is to enlarge your holes?

A. That is right.

(Testimony of Hilding F. Lind.)

Q. So you used the charge in there, but not to break the laws in any way?

A. It is primarily a charge, what we call, you drill the hole, your hole is usually not over, by the time you end it, quit drilling, say, into a bank 20 feet deep, your hole when you are at the bottom of that drill hole is possibly only one and a half inches around. Well, that won't hold enough powder to do any springing in there so what we do, we do springing, in other words, you may put two sticks of powder in that hole and tamp it and then put sand on top of it. What happens is a minor explosion inside the bottom of this hole. When you blow that out, that is, with air, I would say you have a hole there then that would probably hold several or eight sticks and what actually happens is that the powder explodes and burns a little hole in the rock. You can get almost any amount that you want in there and continue to spring until the hole is large enough so that you may get in five hundred pounds. Well, figuring it a half a pound short it should move a thousand yards, in that vicinity—or a hundred yards, in that vicinity, and springing causes the ground to shake.

Q. Mr. Lind, I notice the next one there is on Station 714. I wonder if by use of Exhibits 25-A through 25-F you could explain what occurred there. [16]

Your Honor, this is fairly well illustrated by these particular photographs.

(Testimony of Hilding F. Lind.)

The Court: I want to read your statement first. Then I will know something about it.

Mr. Denecke: Certainly.

The Court: Is there any objection if this exhibit is introduced in evidence, and then the witness will not have to read the statement before he discusses it and the matter is open for cross-examination. I know that some of this is absolutely immaterial. I can see that no liability can be predicated at Station 679 because the witness does not know who caused it. It may be caused by the Southern Pacific, but I do not see how Kuckenberg can recover against the Hartford or Southern Pacific. Even if it were an accident all of the witnesses——

The Witness: Pardon me, your Honor, but there are a few things like the small ones. You will understand when I wrote up the time——

Mr. Powers: Excuse me just a minute, please. We would have no objection, your Honor, to the question that you asked with the understanding that the Court will consider the weight of it or lack of weight of it for what it is, and I think that they have the diary here ready, and we can look at it, but two or three——

Mr. Denecke: We only have the diary for [17] 1948.

The Court: Have you any objection?

Mr. Gearin: No.

The Court: When you interrogate this witness you can go ahead and talk to him about the items in Station 714, and I will have read this.

(Testimony of Hilding F. Lind.)

Q. (By Mr. Denecke): Mr. Lind, did you at the time know what caused the damage there?

A. Oh, yes, I did at the time.

The Court: You mean on August eleventh you knew what caused this damage?

The Witness: Well, I would say that there were times on the track here that, where rocks would come down. I might not know what brought a rock down, particularly at that time, but I knew what caused the damage to it. The rock came down.

The Court: I do not understand him.

Mr. Denecke: I am surprised if I understand him, your Honor.

Q. My question, Mr. Lind, is did you know at the time what caused the rock to come down?

A. In most cases I did, yes.

Q. In the first two items here?

A. That is so long ago.

Q. Well, I know, but you can——

A. I cannot separate this particular August 11th. "No blasting was being done yet at this location at this time, and the [18] causes of damage are the same as on August 5th."

Well, on August 5th I had a large boulder fall on the track—well, I might explain myself. At the time I put down that the boulder came and fell on the track, that is what happened. I can't say now that I remember that identical boulder, but I did at the time that I put this down.

The Court: Just listen to what Mr. Denecke is asking you. Try to answer his question. He has got something in mind.

(Testimony of Hilding F. Lind.)

Q. (By Mr. Denecke): Reading this now, Mr. Lind, are you able to state after reading this, is your memory refreshed so that you can state what caused the rock to fall on August 5th?

A. On that particular August 5th?

Q. Yes. A. The springing.

Q. And the same thing is true on August 11th, that date?

A. It apparently is, because I have got down there a boulder came down——

The Court: I do not think that is true, Mr. Denecke.

Mr. Lind, do you recall—in connection with the damage that was done at Station 679 on August 11th, do you know whether that boulder fell because of the springing or the blasting or because of vibration due to the fact that the Southern Pacific ran its lines over there over a period of 20 years? Could you have told on August 11th at the time that the rock fell down? [19]

The Witness: Yes, I think I could have said at the time it came down, definitely.

The Court: You would be able to determine whether or not the damage resulted from vibration over a period of many years or from springing or from blasting or from the fact that men were walking around up there?

The Witness: Well, I would if I had at that particular time, I had the knowledge, because this first one, I say that it was done by springing. On the next day I say it was done by the same causes, and the cause of the damages are the same, so I

(Testimony of Hilding F. Lind.)

assume that that is what happened, is the springing.

The Court: I did not see that last sentence there. When did you examine into this damage? How long after August 11th?

The Witness: Well, I have my daily reports that where we had damages on the track that it was put down on the foreman's report of the damages, and that was done right at the time.

The Court: Do I understand that, through these entries that were made on this exhibit, that you personally examined the damage that was done and made a determination as to what caused the damage?

The Witness: No, I don't think so. I had foremen on the job. I was not all over this thing all the time, and it is true that in practically every case wherever we had trouble on the track I made it a point to find out whether it was from some particular cause, either by working up above [20] or by shooting or springing or clearing or vibration even, so that I would know what happened because we had a crew which was doing nothing but fixing railroad track.

The Court: Sometimes it was pretty difficult to determine the precise cause of the damage, was it not?

The Witness: I agree with you. I think it was at times.

The Court: Then what would you do? Would you make an estimate of the cause based upon facts that you observed and what people told you?

The Witness: Well, I would say normally that

(Testimony of Hilding F. Lind.)

if I was not there and a rock had gone down on the track, why, I would say to the foreman, "Now, where did it come from?" He would say, "Oh, it come off from the bank up there and slid off." Well, if we were working very close to that I would naturally assume that it was caused from vibration by the machine, or if we were springing, I would think it was from springing reasons, or if I didn't know of any other reasons that you could connect with the job, why, then I would say it probably would have come down anyway because there was no connecting it.

Mr. Denecke: There are some instances, your Honor, we are sure exactly what the cause is.

The Witness: If there was something working around there, I think the average person could say, well, it is caused by vibration of a shovel operating, but in some cases, why, it is hard to determine identically what happened because you have [21] no way of knowing what was close to it. You would then say it was a slide. We would call them like that a slide, or you might, would blame it on the weather even, rainfall, or something like that.

Mr. Denecke: Has your Honor had an opportunity to read the August?

The Court: I am going to read it now.

Q. (By Mr. Denecke): Have you read that, Mr. Lind?

A. Yes, I have read it. I remember it.

Q. Mr. Lind, with the use of the photographs here, 25-A through F, could you state to the Court

(Testimony of Hilding F. Lind.)

and show to the Court what occurred at that time? Your Honor, the photographs illustrate fairly——

Mr. Gearin: Which station is this you refer to?

The Witness: 714.

Mr. Denecke: 714, August 24th.

Mr. Gearin: 714?

The Witness: I have two pictures of this one before, and here is one that is after. This first picture shows the——

Mr. Denecke: 25-A?

Mr. Powers: 25-B.

The Witness: The cut that is showed to our bottom and to our right, we can see the railroad track of the Southern Pacific line, and we can see these here are the rails. We can see that there were three or four feet of dirt has been hauled in and [22] placed on top of the railroad track.

Now, we drilled this rock with lifters from down below, and at the spots shown here and ending off up here (indicating), this cut was supposed to have been cut out like that when it was shot, and then the slab was to have been taken out, and under this program we had figured that there would not be enough weight on this with that covering the entire railroad so that the rock would fall on the track and do any excessive damage.

Q. (By Mr. Denecke): Mr. Lind, see if you can mark on that with a pen there how much that you took out.

A. I think it would come out about like that

(Testimony of Hilding F. Lind.)

(drawing on photograph). This, in fact, is finished road down here, so your deal would be down like that about 20 feet. Well, as you can see here, this tree is this same tree after the shot. This is the top of it right here, and the top of this tree that you see here is this tree sitting over here. This broke back. According to the Bureau of Engineers, we took out about 12,000 more yards, more material in back out of this than was originally designed to come out, yet, at no time—our shots were all examined by the government—we did not shoot any dynamite shots beyond the toe of our slope. This all up here came of its own free will. You can see these enormous boulders here. There is a man on them. That thing is probably almost 75 to 100 feet square and 30 to 40 feet deep. That in itself [23] come from clear up here in the mountain.

The Court: How far away from the place where you did the shooting?

The Witness: Well, it is above the shooting. We took the bottom out. We were attempting to take the bottom out, and then, as you can see, all of this rock up here came down. The two pictures are taken pretty much from the same angle. These are big boulders laying up in here.

The Court: You did not intend that the boulders would come down at all?

The Witness: Neither did the government engineers. This is staked only to come to here (indicating), and this slab to come off, but when there is a fault in here—the picture of that fault was

(Testimony of Hilding F. Lind.)

taken previous to the shooting, not that we knew it was going to bust that far, but we took the picture of that fault so we could show the Army Engineers. This is the rock in question here, and there is that small seam that ran under here. Now, we were asked to take it down like that (indicating). That is the way it was staked, but when we shook this a little bit, this whole mass came down. It was not anticipated, no.

Mr. Powers: Which item of damage are you referring to?

The Witness: August 24th.

Mr. Gearin: Station 714, August 24th.

The Court: Did you blast again on the following day, or is [24] that just how you broke up your time on the 25th?

The Witness: The 25th, those big rocks that came down there are—of course, it was too large to ever—not having previously been drilled, of course, you have to drill them. In other words, we have to split them so you can get them small enough so you can handle them, and we shot this small enough so that we could handle them, and these are repairs taking over a period of two or three days. When you fix the railroad track, the next day even after the train has gone over it, there is a settlement, and they pick it up again and re-ballast it, and that might go on, depending upon the weather or the conditions, for three or four, five days. That is why your expenses would be over four or five or even a week. I think the railroad

(Testimony of Hilding F. Lind.)

company knows in some cases even as long as a month after damage to a track in a certain section it was necessary to go back and reballast or take up and get the sags out of the track, although there may not have been any way——

Mr. Denecke: Your Honor, I know that the question of the amount of damage is not involved, but I think it is in order to state that the damages asked for here are not the entire damages by any means that were caused by this particular blast here, only what we estimated was caused by the overbreak.

The Witness: This station at 620——

Q. (By Mr. Denecke): This is August 27th you are speaking of now? A. Yes. [25]

Mr. Denecke: Would this be a good way to handle it, if he reads it, ask if there is anything that he has on it; is that agreeable, Mr. Gearin?

Mr. Gearin: Yes.

Mr. Powers: I do not see any point to arguing. Like he said, the Army Engineers felt the same way. It is mostly all in argument. I think he ought to testify as to his ability as to what happened without argument.

The Court: You cannot hold a man who is going to testify to this on all the correct legal requirements.

The Witness: Well, on August 27th, damages caused by a snag falling on the track. Well, at that point several times there were snags, and in that

(Testimony of Hilding F. Lind.)

vicinity up there, it was full of snags, and a snag fell on the track.

Mr. Gearin: That is at Station 620, Mr. Lind?

The Court: Will you tell us each time whether you made a personal investigation yourself and what was your conclusion?

The Witness: All right.

Mr. Denecke: May I add, Mr. Lind, if you want to here, we have—your diary, you have never found it and I have not, either, for 1947, but we have the time cards here. I do not think the Court wants to know what the foreman thought, but if there is any other information on here from which you can answer the questions, why, you just ask for it.

The Court: This August 5th, is that 1947? [26]

Mr. Denecke: These are all 1947, your Honor. Yes, your Honor, this all covers 1947.

The Court: He does not have his diary for this?

Mr. Denecke: I might ask Mr. Lind.

Q. Do you know where your diary is for 1947?

A. I take it it is in my—

The Court: He has not got it.

Mr. Denecke: He has not got it.

The Witness: Well, on this damage caused by a snag falling on the track, "This damage was caused by a snag falling on the track. This particular tree came from about a quarter of a mile above the right-of-way and was caused by drilling in the vicinity." I don't know, apparently at the time I made these investigations, I might say in 99 per cent of the time, in fact, I think almost a hundred

(Testimony of Hilding F. Lind.)

per cent of the time, I was on the job all the time, and whenever there was any railroad trouble or anybody working on the track, why, I usually was down there to see what caused it. I was really at all of this all of the time. I can honestly say that.

September 3, Station 665. I do remember that in particular because I can see there was an argument with the Bureau over not notifying them that we were going to shoot, but the shot was of such small consequence that we were shooting in places that appeared to be much more dangerous than that, and we had an awful big slide there, and it blocked the road for [27] two or three hours, and it was quite a mess, and we did some damage to the railroad track. I particularly remember that one.

Well, that is the same part of it.

Q. September 4th and September 5th?

A. We tore out some track there, and we were back in there reballasting and straightening the line which we would go back sometimes two or three days to do.

Q. All right. Now, September 8th, Mr. Lind.

Mr. Gearin: Just a minute, Mr. Denecke. On September 3rd and September 4th, 1947, that involved Station Number 665?

The Witness: And the fifth.

Mr. Gearin: And the fifth, September 3rd, 4th and 5th, at Station 665.

The Witness: We only had the one shot at 665, although we had quite a lot of trouble with that one shot.

(Testimony of Hilding F. Lind.)

At 699, I remember that one, apparently, because we had a lot of trouble there. We blanketed the track, and we shot and the rock broke very large, very big, and dropped directly on the track, not all of it, but there was some rock dropped on the track and broke rails, and these are just repairs. September 9th and 10th are repairs that happened on September 8th. This is at 669. That is a stretch of what we call talus, big boulders in it.

Mr. Powers: Is that 669?

The Witness: 669, on September 11th. That is a stretch [28] of over the railroad track. That is the talus. It is not a solid rock; it is with the big rock mixed in with it and the little rock so that it is more in a slide formation. Occasionally a big rock would roll down with small stuff and hit the track and damage the track. That was not caused from shooting or anything. That is caused from vibration, can be by rain, or it is a slide formation is what it is.

The Court: How many times did that happen on the job in the two years?

The Witness: You mean the rock?

The Court: Ravelling, an average?

The Witness: Oh, I would say on the average of 25 per cent of your damage is done that way or caused from—that is where there is single tracks and where there is a great area broke out, where one track would get broken, you would usually find 25 per cent of the damage was caused by just nat-

(Testimony of Hilding F. Lind.)

ural causes just like maybe the wind blowing, causing something to start.

Mr. Denecke: I think, Mr. Lind, what the Judge wants to know is how often does that raveling start from shovels or other equipment being operated?

The Court: He answered the question. You cannot tell. Oftentimes it is brought on by natural causes. Sometimes it occurs when there has been shoveling?

The Witness: Right. [29]

The Court: Sometimes it occurs when there is blasting. Can you tell in advance whether rocks are going to ravel or not?

The Witness: No, you cannot.

Q. Did you get any advice from some of the powder companies as to how much powder you should use?

The Witness: Yes, sir, we always do on all our work. In fact, when we bid the job, why, they usually advise us as to how much rock is anticipated per yard, how much per pound, or what percentage of what pounds it would take, and they also give you their experience as to how to put your holes, and our powder company, the company we bought our powder from, was represented up there, I would say, 70 per cent of the time, with his experience.

The Court: Did he tell you that you could determine fairly accurately the amount of rock that would be moved by a certain quantity of powder?

The Witness: Yes.

(Testimony of Hilding F. Lind.)

The Court: Just the same, he made you sign the release sheet?

The Witness: What do you mean, release?

The Court: Before he gave you any advice, isn't it a fact that the powder company made you sign a release excusing him from all liability?

The Witness: Not in this particular case. [30]

The Court: What is the name of the powder company?

The Witness: Pacific Powder.

The Court: Do they not use a standard form of release?

The Witness: If there was, your Honor, I never seen it. At least, I didn't know anything about it.

The Court: I will venture to say they did, but go ahead. The Powder Institute requires that as a condition for giving advice. I will show you the form.

The Witness: They may, but I never seen it.

September 13th, 694.

Q. (By Mr. Denecke): In this particular one, Mr. Lind, you were shooting—if we are facing southeast with the railroad right-of-way on your right; is that not right? A. Yes.

Q. And you were shooting here on the left part of the old road, widening it into a hill on the left there, and do I understand that the shot, then, caused the rock to spread over the old road and off to the right and down onto the track there?

A. Sometimes, yes.

Q. In this particular case it did?

(Testimony of Hilding F. Lind.)

A. In this particular case, it did, yes.

The Court: Which one are you referring to?

The Witness: September 13th.

Mr. Denecke: September 13th.

The Witness: September 16th, that is the same as the 13th, [31] and September 17th.

Mr. Gearin: Is September 16th the same station?

Mr. Denecke: No, 669, Mr. Gearin.

The Witness: It is at Station 669, September 11th.

Mr. Gearin: I thought it was 699.

The Witness: That is 669. That is where that rock unravelled there awful bad.

The Court: There was an occurrence in between that at a different station.

Mr. Denecke: It is a different one.

The Witness: Yes, there was an occurrence between there. September 20th, 714, that is the one we showed the pictures of there, and that was just additional repairs after a train had gone over for a few days. We went back and straightened up the line, reballasted it, and we did some overhanging. When this overbreak happened, why, we had to go back and smooth off the slope again, and some more rock came down. On September 24th, Stations 680 to 683, that is where they put in a viaduct there, and the material there was very clayey with occasional boulders in it. An occasional boulder would roll loose and roll down and hit the track.

Mr. Gearin: What is the station, 680 to 683?

The Witness: That is September 21st.

(Testimony of Hilding F. Lind.)

Mr. Gearin: May I ask, Mr. Lind, if you will help me out on these things, would you mind giving me the station and then [32] the date? I will be able to go down the line with you.

The Witness: All right.

Mr. Gearin: Thank you.

The Court: Mr. Powers, do you have a copy of the exhibit?

Mr. Powers: Yes, I have a copy of it, your Honor.

The Witness: September 22nd, that is a repair caused by a spot that showed on September 21, and September 23 and 24 is the same. September 25 is the same repair to this track in the same location caused from the shock of the shot of a week before.

October 1, this damage was caused by slide. I remember this one personally, too, because it happened, the reason I recall it so well, it happened to be where the footing of the viaduct went. There was a lot of question at the time we were putting a footing in as to whether that would hold the weight of a slide, and we were concerned at the time whether we were going to be able to get a footing in there. That is why I happen to know. It was just a slide, and the rock went down on the track.

The Court: Is it your belief that this slide would have occurred even if you had not done any work up there?

The Witness: No, I would not say it was that because we are bound to disturb the ground. May

(Testimony of Hilding F. Lind.)

have. I would not say it wouldn't, but it probably did not.

October 1, the damage was caused by another slide brought [33] about by a shovel in the same manner as Station 685.

The Court: I think, Mr. Denecke, you ought to point out those instances in which you believe Southern Pacific should pay you.

Mr. Denecke: I can do that.

The Court: Because it had nothing to do with the work. You do not have to do that right now, but as the witnesses testify, if there is an item which you believe is chargeable to Southern Pacific—

Mr. Gearin: Your Honor, in response to certain interrogatories, I have five items here. We have only passed one so far.

Mr. Denecke: Do you want to check those?

The Court: Which one is that?

Mr. Gearin: August 27th.

Mr. Denecke: August 27th.

Mr. Gearin: Station 620, a tree on the track which the witness has described as being caused by drilling in the vicinity.

The Court: What date was that?

Mr. Gearin: August 27th, Station 620. That is the first one which they contend we are responsible for.

The Court: Did you make a personal investigation of that, of 620?

The Witness: Yes.

(Testimony of Hilding F. Lind.)

Mr. Denecke: August 27th. [34]

The Witness: That is the first one, isn't it?

Mr. Denecke: No, August 27th.

The Witness: Oh, this one?

Mr. Gearin: This particular one.

The Witness: Yes, I was there then.

The Court: Of what did your investigation consist?

The Witness: Well, usually by going out there and finding out where the snag came from. In other words, that entire country up there is blown over with millions of snags, and they extended for a mile above the railroad track. We had a lot of them that go down from as much as a half a mile above us, and some of them ended up on the railroad track down below, and you would always look to see where they came from, and if there was no work in that vicinity, you always figure that they just—the wind blew them over, or something, which is always happening, occurring there.

The Court: Well, how did you know? In this particular instance you came to the conclusion it was caused by drilling in the vicinity.

The Witness: Yes, in this particular case, I did; that is right.

Mr. Denecke: Your Honor, do you want me to take the rest of those, and I can take them——

The Court: No, you do not have to take them, but as we come to a point, you call my attention to it. [35]

The Witness: Where was I at?

(Testimony of Hilding F. Lind.)

Mr. Gearin: October 1, Station 683, was the last.

The Witness: October 1, Station 714, was caused by a slide. I have not any recollection of that particular deal there at all, except I think that was caused by a slide. What constitutes a slide to me is something that is natural, the ground rolls.

Q. Looking at that, Mr. Lind, the slide there, apparently, in your judgment, was caused by a shovel; is that correct?

A. Yes, caused by a shovel in that particular case.

Mr. Gearin: That was the same as at Station 714, occurred from the same cause; is that correct, Mr. Lind?

The Witness: Yes.

The Court: Is that the next one?

Mr. Gearin: That is the last one on page six.

The Court: Is that the next one we have a claim that the Southern Pacific is liable for?

Mr. Gearin: No, we have not gotten to that yet. The next one they claim is that on the last that Mr. Lind has.

The Court: Go ahead.

The Witness: October 1, I guess that particular bill is for loading and hauling material where there had been a slide on the railroad track.

Mr. Denecke: In other words, your Honor, if I may explain, this is geared to a statement of [36] expenses.

The Witness: October 2, 708, this was caused by

(Testimony of Hilding F. Lind.)

rock rolling off the shovel and falling on the track. When we say rolling off the shovel, we mean that we pick up a rock, and you swing around to load it in the truck, and if it rolls off the teeth, and when we say rolling off the shovel, we mean it rolls off the bucket, and it is liable to fall into the truck, and it happens quite often he busts the truck, and it is just like—most of these big rocks were balanced on the end of your teeth as you load it, and if they fall off the shovel bucket, why, they do damage.

October 6th, Station 668, this damage was caused by a falling snag. This snag fell as a result of falling another tree next to it. In other words, when we fall, do clearing and falling timber, if you fall a tree, if one tree happens to hit another one, a snag, why, the snag may fall, probably will.

The Court: Did that?

The Witness: That in turn went down on the railroad track.

The Court: And damaged the railroad track?

The Witness: And damaged the railroad track. As they go endo, they will go down, hit the rail, tear out a place, is what happened.

October 8th, Station 635, at this time there was a great deal of blasting in this vicinity of these stations. Well, in that place at Station 633, there was an awful lot of rock moved. I said a hundred thousand yards of rock, which by the [37] plans you can total it, and that is probably what it totaled up, and although we had a little railroad damage

(Testimony of Hilding F. Lind.)

through there, occasionally a rock would roll down our roadbed, roll down and hit the railroad track, and that is what those were made up of.

Station 635, we did some blasting there, and we caused some damage.

Here is damage caused October 10th, Station 638, by a tree hitting a track and knocking it out of line.

Well, some of these trees that we felled would be up in the hill, and they would be, maybe, oh, as high as five, six, seven, maybe a thousand feet above the railroad, and when you fall one of them, if they would happen to roll longitudinal with the hill or vertical with the hill, they would just go endo until they stopped, hit either the road or the railroad track.

This October 11th, Station 682, this is the place where, that is with reference to damage that was done before, and it was resurfaced, and, as I recall, this Station 682, there was so much rock rolling down there occasionally that the track was relocated, was moved out a little ways to protect it a little more. The rocks occasionally rolled down.

October 14th, Station 682, that refers to the same places. I think we were moving track at that time, relocating railroad track. [38]

October 22, Station 640, large quantities of rock and other materials were blasted, and almost all of such materials went places other than the track.

Q. (By Mr. Denecke): Do you remember that particular occasion?

(Testimony of Hilding F. Lind.)

A. Yes, I do. That was part of that same location where I said there was approximately a hundred thousand yards moved. We would shoot there, and, as I say, our damage there was not too extensive, but occasionally a rock would, when you shoot, would hit the railroad track like it will where you are shooting that much track and go down and break the track or bust a tie or something.

Mr. Powers: Which one are you speaking of now?

The Witness: Station 640.

Mr. Denecke: October 22nd.

The Court: We will take our afternoon recess.

(Afternoon recess taken.)

HILDING A. LIND

recalled, testified as follows:

The Court: I suggested to Mr. Denecke that in view of the fact that this is not a hearing on damages, that he only talk about such additional occurrences as are illustrative of his four types of claims, and if he has sufficient now to illustrate each of the four types, that he confine his other interrogation to the claims against the Southern Pacific. Go ahead.

Mr. Denecke: Well, your Honor, I believe I have covered [39] the various classifications as far as claims against the Hartford are concerned.

The Court: Yes, I think so.

Q. (By Mr. Denecke): Mr. Lind, turning to

(Testimony of Hilding F. Lind.)

page 8, on October 7, would you read that? First read it to yourself to refresh your recollection.

(Witness peruses document.)

The Witness: Yes, I remember that very well.

Q. Mr. Lind, I hand you Exhibit 27 here only for purposes of refreshing your recollection.

Mr. Gearin: Does his memory need refreshing on this point?

Mr. Denecke: Well, I assumed it did.

The Witness: It did on that particular thing.

Mr. Denecke: 27, your Honor. Well, I will ask you, Mr. Lind, do you recall now this incident?

A. Yes, I remember very well.

Q. Would you state, then, what occurred?

A. Well, the train was coming out with the logs that particular night, and before the train comes down, why, the railroad inspector comes ahead of it with the speeder. He travels ahead of the train, probably a half a mile, and checks the track so that it is in good condition to go over. In this particular case, why, I don't recall just exactly the amount of cars, but there was three or four cars went off the track and into the Santiam River, and we were using the railroad [40] track as a detour at that time so we built a temporary detour in order to get the traffic through there, and Mr. Smith—I mean the conductor and some of the cars, three cars went in the river, and some logs, and they asked us to pull the logs up on a high spot of ground so they would not float out, and then later on in the next

(Testimony of Hilding F. Lind.)

two or three days—I don't remember just exactly the date—why, we helped them put the cars back on the track. We were naturally disturbed as to what caused the train to go off the track, and there was a rather—the inspectors looked at it, and the railroad crew, and I talked to a couple of railroad inspectors a few days after that that looked at it, and they told me——

Mr. Gearin: We object that, that is hearsay, your Honor, not being shown whether the inspectors had any authority to make the statements binding on a corporate defendant.

Q. (By Mr. Denecke): Do you remember who these people were, their names?

A. The inspectors, yes, John Clark was the inspector at the time.

Mr. Gearin: John Carr?

The Witness: Clark.

Q. (By Mr. Denecke): Was there anyone else employed by the Southern Pacific? You say inspectors. That is the reason I asked.

A. I think that the tool inspector, I can't think of his name [41] right now, I think he is sitting right there, too.

Q. I hand you Exhibit 27 and ask you if, reading that, you are able to recall?

A. Ray Ross, yes, Ross was there at the time, and John Clark and Mr. Smith came up there. I know he was in traffic investigating with the Southern Pacific. We were all down looking, try-

(Testimony of Hilding F. Lind.)

ing to find out why the train went over, and at that time they said that it was from——

Mr. Gearin: Same objection; same objection.

Q. (By Mr. Denecke): They made statements to you concerning the reason the train went over; is that right? A. That is right; they did.

Mr. Denecke: Is your Honor sustaining the objection?

The Witness: I can say that there was never any repair done on that track. The train was put up on the track. There was no change ever made in the track there at that point.

The Court: I was interrupted during the middle of his answer. You say you were using the track as a detour? Well, what do you mean?

The Witness: Well, this entire mile and a half of railroad track was used as a detour all the time.

The Court: A detour for the railroad track or for——

The Witness: For vehicles, for vehicular traffic, and we blanket between the rails.

The Court: You blanket between the rails? [42]

The Witness: Right.

The Court: Then there was vehicular traffic over this stretch of track?

The Witness: Right.

The Court: Prior to the time that you blanketed it, were there any blankets on that stretch of track?

The Witness: Before we blanketed it?

The Court: Yes.

The Witness: No, sir; there was not.

(Testimony of Hilding F. Lind.)

The Court: It was merely used as a——

The Witness: Detour.

The Court: By the Southern Pacific?

The Witness: No, by the public because, you see, we were constructing the new road, and the old road was—you couldn't get over the road, the old road. It was obliterated, so we used the Southern Pacific tracks as a detour. That was according to our contract, Judge. The Bureau had gotten permission to do that. That was part of the original contract, to maintain this detour.

The Court: Now I understand. And did you make an investigation or did you form an opinion as to what caused the cars to fall into the creek?

The Witness: Yes, sir.

The Court: First I think we ought to qualify the man to see if he is qualified to form an [43] opinion.

Q. (By Mr. Denecke): What experience have you had, Mr. Lind, in determining the cause of rail derailment?

A. I would say very little when it come to causing a train to go off a track.

I have had quite a bit of track experience. We put in an eleven-mile railroad for the Union Pacific in 1943 at Tacoma, Washington. I was the superintendent on that job, and we put in eleven miles of railroad, switches, and such as that.

The Court: Let him testify anyway. Go ahead. Objection overruled.

(Testimony of Hilding F. Lind.)

Q. (By Mr. Denecke): What was your opinion as to what caused the train to go off the track?

A. Well, it was everybody's opinion that there was nothing——

Q. How about yours?

A. Just mine, there was nothing wrong with the track. It had to be something else that was either rolled on the track, because there was nothing wrong with the track at the time the cars went off, but we did no work near the detour of the Southern Pacific Company repairing the tracks. After the cars were put on, they still continued to use it.

Q. Was there any obstacle on the track?

A. No, there was nothing on the track whatsoever.

Q. Do you have any further opinion, you personally, as to what caused the derailment, in view of what you stated?

A. Yes, I looked at the trucks that were in question, and they [44] were thin. They wore very thin and I think that is what caused it.

The Court: The trucks; are you thinking of the cars?

Q. (By Mr. Denecke): Trucks of what?

A. The trucks of the logging cars.

Q. The railroad cars?

A. The railroad cars. They are logging cars, is what they are. It is a set of wheels.

Q. And the work that was done at this time did not concern the repair of the track?

(Testimony of Hilding F. Lind.)

A. No, sir.

Q. That work was, consisted of——

A. Building a detour around that part of the train. Of course, most of the train still remained on the track, and we had traffic waiting, and we built a detour temporarily around this particular section where the railroad was blocked.

Q. A part of it, also, Mr. Lind, concerned pulling the train, the labor and the equipment to pull the train and the logs out of the river; is that correct?

A. Yes, they requested that we have them get the train out of the river, the cars out of the river.

Q. Mr. Lind, if you will turn to page 11 at the top, January 7, 8, 9, 10.

The Court: What date?

Mr. Denecke: January 7, 8, 9 and 10, your Honor. Would you [45] state there if you recall what occurred?

A. Well, we had a heavy rain. We had a very heavy rainfall, and the culvert underneath the track plugged up, caused by debris coming down from the mountains there, and plugged that culvert, and, consequently, the water had no way of getting out, and it went over the top of the track and washed out part of the railroad, the ballast from under the railroad.

The Court: Near what station did this occur?

The Witness: At that point on A-3, job A-3, and I would say it was about—it does not say. There is no station here, but Mayflower Creek was the——

(Testimony of Hilding F. Lind.)

Mr. Gearin: Mayflower Creek?

The Witness: Yes, that is on job A-3.

The Court: Is that near the center of the job,
or——

The Witness: No, no, that job was only a mile long. I would say it is about 620 to 626 or something. It has been four years now, but I would say about 626, something like that, twenty-seven.

The Court: Go ahead, Mr. Denecke.

The Witness: Well, that took care of that pretty much. I haven't any more to say about that.

Mr. Denecke: Look at April 9, Station 699.

The Witness: April 9?

The Court: What page?

Mr. Denecke: It is page 14, your Honor. [46]

Mr. Gearin: Fourteen.

The Witness: What item there do you want?

Q. (By Mr. Denecke): Would you read that, Mr. Lind, and then state whatever else you have to add on that, if you have anything?

A. "On this particular date there was no work being done at this spot but a part of the outside edge of the road fell out onto the track. This was probably caused by a fault or crack in the earth and equipment passing over this section. This is illustrated on the attached diagram."

Yes, I definitely do remember that.

The road at that time was finished, what we say finished. It was finished to the point where there was no more shooting or anything going on, and there was a fault. That particular place overhangs

(Testimony of Hilding F. Lind.)

the railroad, if anything, just a little bit, and I would say, oh, I would say about fifteen hundred yards just fell out and fell onto the track, and we cleaned it off and fixed the track.

Q. At the particular time that it fell there was no work being done? Was there any equipment going over the road at that time?

A. Well, there was equipment occasionally going up and down, but, if I remember correctly, I think even traffic was going on up above at that time, ordinary private automobiles.

Q. Ordinary traffic?

A. As I recall it. [47]

Q. Mr. Lind, when the job was completed, which was in the spring of 1949, were you required to recondition the road? A. Yes.

Q. I am speaking of the railroad right-of-way now. A. Yes, we were.

The Court: I do not understand. Who required that?

Q. (By Mr. Denecke): Who required you?

A. In our original contract we have to leave the railroad track—we have to be released by the railroad that their track is in good condition, and in order to get a release from the Bureau of Public Roads we had to get a release from the railroad company, and the railroad company wanted these certain places, in fact, most of it, realigned a little bit, reballasted, in order to use it after we were gone, without any expense.

Q. Did you examine the portions of the road

(Testimony of Hilding F. Lind.)

that were reconditioned? A. Yes.

Q. In your opinion, Mr. Lind, was the work that was done by you required by the fact of ordinary wear and tear of the railroad, or was it required by the work and the damage that was caused by you people?

A. Oh, I would say that it was caused by the railroad because those tracks had planked on them, as you understand, and the traffic used it, the track, mostly automobile traffic. They [48] are not too hard on the railroad. It was all planked so that there was no maintenance, not normal maintenance carried on the railroad during the year and a half that it was in use.

Q. Maintenance by whom?

A. By the railroad company. There was no maintenance there at all. There had been—I understand there was a maintenance section crew there all that time.

Q. Do you know this of your own knowledge?

A. Yes, I know this of my own knowledge. They had a crew previous to the time of the contract that worked in this particular section of maintenance of the railroad, replacing ties and rails and ballast. In the year and a half that we used it as a detour, there was no maintenance on the railroad itself, so, consequently, when we were finished with our job, why, there were some low spots and ties to be replaced that were too old, rotten, and some reballasting to do that would be considered

(Testimony of Hilding F. Lind.)

normal wear and tear, or it would have been done previous if it had not been for the detour.

The Court: There is one other item that Mr. Gearin told us about that was not listed in this.

Mr. Gearin: He has covered it. He had it some place else, your Honor.

Mr. Denecke: It was, your Honor. It was not listed chronologically.

The Witness: Yes. [49]

Mr. Denecke: October 7, Sardine Creek.

That is all, your Honor.

The Court: Let Mr. Gearin examine about the Southern Pacific claim first.

Cross-Examination

By Mr. Gearin:

Q. Mr. Lind, going back in backward order taking first the reconditioning of the road bed, you were familiar with that contract, that is, the proposal and contract in this case, Project 24-A2?

A. Yes, yes.

Q. I will ask to hand you this document, the contract which has been marked Plaintiff's Exhibit No. 1, and refer you to the top of the paragraph referring to maintenance and restoration in particular with reference to the special detour.

A. That is right.

Q. Is it not a matter of fact then, Mr. Lind, that you were required to put the road bed back in the same situation, in the same condition that it was when you started the special detour?

(Testimony of Hilding F. Lind.)

A. I would say that it was supposed to have been as equally as good, but I think that in this particular case it was better.

Q. But you performed the work then because of this particular provision of the contract to which I call your attention? A. Right.

Q. Mr. Lind, did I understand your own testimony to be that the [50] type of work that was done would nearly have to be done by the railroad anyway after the expiration of a certain period of time? Was it normal maintenance or what?

A. Well, I would think—yes, it was normal maintenance in almost all cases. There were some cases there where—we didn't list them though in the bill to the Southern Pacific. I worked on this bill myself, and any work done where there was any damage or where anything on the track we didn't bill that all against the railroad. We did bill anything that we thought where there was a re-lining or reballasting that was beyond the scope of our contract.

Q. Who asked you to do that or directed you to do it?

A. Through the Bureau of Public Roads and the Southern Pacific.

Q. Did you say that any of this where this detour was put in, any of that had been rebuilt because of rocks landing or trees landing on it?

A. We did not include that in the bill to you people. That had nothing to do with it.

Q. Well then, when you had planking on there

(Testimony of Hilding F. Lind.)

that you have described that you had had, this is just a portion then of your work that you had to do on the over-all tracks?

A. Right; this is just a portion.

Q. There were lots of sections where you had to reballast and reballast even two or three times where damage had been done to the track? [51]

A. That is right.

Q. Over this detour you would have these heavy pieces of equipment, Caterpillars, Tournapulls, and all that big—

A. We never did use that detour for our own equipment more than vehicular rubber tires.

(Thereupon, there was discusison off the record between court and counsel.)

Q. (By Mr. Gearin): To sum that up, the items of April and May, 1949, reconditioning of the road bed, that work was required by Bureau of Public Roads and the Southern Pacific Company? A. Correct.

Q. In some instances you think you put it back into a little better condition than it was before?

A. Yes, sir; I think we did.

Q. Going back to the—I am going backwards you will understand. I will give you the reference to the page. A. Yes.

Q. On the item of April 9, Station 699.

A. What page is that?

Q. That is page 14? A. Yes.

Q. Now, referring to that item, you say that that

(Testimony of Hilding F. Lind.)

was probably caused by a fault or crack in the earth and equipment passing over this section?

A. Correct. [52]

Q. That would be Kuckenbergh heavy equipment, wouldn't it?

A. Not necessarily. As I recall, in April—in fact, I am quite sure of this—in April all traffic, vehicular traffic, was no longer on the railroad track down below. It was all up above, and they were all using the highway.

Q. Well, now, referring to that diagram, you have a portion marked "B." That was new work in through there; was it not?

A. Everything above that new road was new work, excepting the old road was there. It was just dangerous.

Q. There had been blasting all in through there?

A. Correct.

Q. Now, referring to the incident of January 7, 8, 8, and 10 on Mayflower Creek—let us see what page you have that on.

The Court: Ten.

Q. (By Mr. Gearin): Page 10 at Mayflower; is it not? A. Yes.

Q. You said that the debris blocked up a culvert? A. Yes.

Q. What kind of debris was that? Was that the debris from your operations up on the hillside, bits of bark, bits of trees, or—

A. No, I don't think it was as much bark as it was possibly some dirt and loose soil, dirt, and

(Testimony of Hilding F. Lind.)

it was just a high flood. We had a terrific flood at that time up there. We had all our creeks running high. That is a normal thing that happens, I [53] know, on roads.

Q. Well, you and I are talking about the same thing; are we not? A. That is right.

Q. On this debris that blocked up the culvert, had there been operations on the uphill side of that?

A. Quite a ways from there. I would say the center line of your highway is probably five or six hundred feet from there.

Q. Was not some of the debris caused by the activities of Kuckenberg somewhere along the line up the hill?

A. Well, the debris, not so much, not debris because it is just a fill that is in there, rock and dirt, you understand. Between the new highway the railroad there is timber; there is brush, and things like that.

Q. You had been up there clearing off the timber and the brush and making changes?

A. Not between the highway and Mayflower Creek, no, but between—up above there is a space between the two there.

Q. Is that where the slide was in there?

A. Yes, it—well, it wasn't so much of a slide. What we had was just a devil of a lot of water, awful high water, and the culvert down below is small.

Q. Refer to page 10, just about one-third of the way down, if you will, Mr. Lind.

(Testimony of Hilding F. Lind.)

A. Yes. [54]

Q. Where it says, "January 8, Mayflower. The first part of January, this area had its heaviest rainfall in years. This caused the surface to be very fluid. Tractors and other heavy equipment moving over and near this surface caused a slide which caused this damage."

You are referring to tractors and heavy equipment of Kuckenbergs?

A. Yes, well, we worked up there at the same time, and also vehicular traffic up there.

Q. Now, then, we get moving back up a bit to Sardine Creek, train derailment.

A. Yes.

Q. At that time immediately afterwards the Southern Pacific Company claimed that the track was in bad condition, didn't it?

A. Well, I don't really know. I suppose they did, but I heard that several times.

Q. Do you have any memory of that now?

A. Of the——

Q. Let us look at page 8. I know this is some time ago, Mr. Lind, where it says, "October 7. Train derailment, Sardine Creek. A car of an S.P. train was derailed."

A. There was more than the one car.

Q. Then this statement, then, is incorrect for that particular——

A. Well, that particular one, I don't know whether it is a [55] typographical error or not. I don't know, but I know there was more than one car in there because we helped to pull them out.

(Testimony of Hilding F. Lind.)

Q. Then the very next sentence: "S. P. claims because the track was in bad condition due to Kuckenberg's operation."

A. Well, that was after the wreck, yes.

Q. Right after the wreck?

A. No, not right after the wreck. This was quite awhile after the wreck because at the time of the wreck there was no such—we never did work on that track from that time on. They logged over that for months after that, and no work was ever done on it.

Q. They had no more derailments?

A. They had no more derailments.

Q. Would there be any debris, rocks, boulders, sticks, or anything like that along where the public would traverse during the, or covering the area where you had this temporary detour?

A. Well, as I explained, that speeder goes down ahead of the logging cars.

Q. Do you know whether or not the speeder went down the night before this happened?

A. Yes, I happen to know a speeder went ahead of the car that day. In fact, I talked to Clark.

Q. Well, then, the speeder goes down for the purpose to see that this area is clear? [56]

A. Yes.

Q. Because something gets on the track. Now, will you agree with me that there is a definite possibility of a rock or boulder getting on the track after the speeder had gone by?

A. Yes, I suppose there is a possibility.

(Testimony of Hilding F. Lind.)

Q. Do you know whether a small boulder or rock itself caused the derailment of the train?

A. I couldn't say that.

Q. Do you know whether any of the planks could have commenced to become disarranged because of the vehicular traffic?

A. Well, we looked at the track after the train went over. We looked at it, and there was no loose planks there.

Q. On the detour, did any heavy equipment also operate over there?

A. Oh, yes, there was times we ran them up there, but not very often. Our Cats would not go up very often, but occasionally one would go up, yes. In fact, when we had big boulders and stuff right down from the hillsides, we would have to have something down there to push them off.

Q. And the area where they had the derailment there, there had on occasions been rocks and boulders down in the same area, come down at periods?

A. Yes, there may have been a very few occasions, but we had very little expense or trouble there.

Q. You had some? [57]

A. Well, when I would say some, I do not think we had ever replaced rail in there. If we did it was without my knowledge. It happened to be there was very little damage done to the track. It was in a clay condition there same as other places.

Q. Mr. Lind, in your operations there would

(Testimony of Hilding F. Lind.)

you say that at times the Kuckenberg operations would anticipate that rocks and debris would be dumped on the track?

A. Well, yes, we anticipated, but we never billed for anything that we anticipated, that is, on the Southern Pacific people.

Mr. Denecke: Are you speaking of this particular spot where that train was derailed?

Mr. Gearin: I am speaking of generally.

Mr. Denecke: Generally.

The Witness: Generally, no, we under-anticipated what we would call operational expenses. In other words, any time that you are working close to a building or railroad or in town, why, you anticipate a certain amount of expense such as flagging or protecting property or delay in time, so we anticipated a certain amount of work to be done on the track above other sections, but none of that to my knowledge—and I worked on these bills personally—did I ever put in bills against anything that I didn't think was not beyond the scope of what we originally planned. In other words, in this breaking and cutting back to this October 7 derailment, we at that time certainly had had no idea that the train was going over [58] the Sardine Creek when we bid the job.

Q. Perhaps you and I are talking about different things, but the question I wanted you to answer, Mr. Lind, was this:

At the time you would start your operations, you anticipated that there would be some physical dam-

(Testimony of Hilding F. Lind.)

age done to the track, ballast, road bed, ties of the Southern Pacific, didn't you? A. Yes, sir.

Q. And you repaired that work? A. Yes.

Q. Were there any items when Southern Pacific ever repaired that or did any work around their own tracks or road bed or ties or ballast at any time?

A. No, there was no—there was a time or two when I called them up there when we needed some help, if that is what you mean.

Q. Well, you will—

A. Well, if you mean there was a steady maintenance gang, no, there was not.

Q. There were times when Southern Pacific Company had a jeep come to help clear the track, right?

A. Yes, when we called them, only on call.

Q. Then they repaired the track?

A. Yes, we helped them repair the track in every case. They usually always had an inspector there. We furnished the men. [59] There were several cases, two or three that I know of.

Mr. Gearin: Will you excuse me a moment, your Honor. I want to confer with our engineer.

(Discussion off the record.)

Mr. Gearin: I have nothing further at this time, your Honor.

(Testimony of Hilding F. Lind.)

Cross-Examination

By Mr. Powers:

Q. Just a few questions, now, Mr. Lind, to summarize this job. As I understand it, you went down to make a survey before you bid on the job?

A. Correct.

Q. How much time did you spend down making your survey?

A. Well, I did it at two different times.

Q. Add them together.

A. When we had the State job, which was just below, we had a contract on the lower end, and I worked there a year at that time and I occasionally—I went up there probably for almost a week, and then we got a job over in Eastern Oregon, and I knew these jobs were in the offing, as you might say. They were set up for February to next spring, and we finished there in October, so I went up there about every day for almost a week, and then when I got the profile, the jobs actually came up, and we went up to right at the Mayflower job, and I was there almost a week, I would say, about ten days all told. [60]

Q. Do you call this Mayflower job——

A. I mean Santiam.

Q. Santiam, yes, I just wanted to call it correctly. A. That is right.

Q. As I understand it, you are very well acquainted in that territory anyhow; are you not?

A. Quite well, yes.

(Testimony of Hilding F. Lind.)

Q. You knew the nature of the terrain and the nature of the work you were going to do; is that correct? A. Yes, I think so.

Q. Pardon? A. Yes.

Q. And the work itself, I believe you said, required you to do two or three different things. One was to clear up—you had to do clearing; did you not? A. Yes.

Q. Did that include the snags and that sort of thing within the area that you have described?

A. Within the right-of-way area, yes.

Q. So you would have men cut them, blowing them out or cut them out of there; is that correct?

A. Yes.

Q. Then you had also to remove lots of rock, gravel, things of that sort? A. Yes. [61]

Q. As I read the contract—you have just said you are familiar with it—you were required, and as a part of your bid, to make this detour and maintain it for the use of the public; were you not? A. Yes.

Q. You had your prices in there for planking this thing, what kind of planking you will use; you had to have flagmen; you had to conduct one-way traffic through there, and that was your responsibility, then; was it not? A. Yes.

Q. You were actually operating that detour, and the detour, as I understand it, was a distance of about a mile and a half?

A. Approximately.

Q. The railroad would go through, the tracks

(Testimony of Hilding F. Lind.)

were there, and the motoring public or anybody going along there would go through, and you would tell them when they could go and so on.

It is also a fact, or is it not a fact, I don't know—I will try to go back—the different types of damage that—or causes of damage that you talked about, Mr. Lind, is from snags, one or two I think you got down. I do not think there was over one or two, was there?

A. Well, possibly a few more than that. Probably not.

Q. Well, there would be snags and then there would be rocks and gravel; that would be it, wouldn't it? Was there anything else coming down there to cause any damage, if you know, in your whole list? I am just trying to summarize it, cut it [62] down, summarize what I understand.

A. No, that was mostly it, snags, rocks and boulders.

Q. Now, then, as far as snags were concerned, you knew that condition, knew they slide down there even if nobody was around there, sometimes, you said; isn't that right? A. Yes.

Q. It was your job on the contract to keep them off there, off of that track; was it not?

A. Not necessarily because——

Q. Well, let me interrupt, then, and then I would like to have you finish. A. Yes.

Q. It would be your job to keep them off of the detour? I will put it that way. A. Yes.

Q. Then other places it would not be; is that

(Testimony of Hilding F. Lind.)

right, unless you were responsible for getting done there? That is probably correct, is it?

A. That is right.

Q. Then the same thing would be true with respect to rocks, then; you had the responsibility for that detour, it was to keep that clean and use it?

A. That is right.

Q. No matter where it came from and how it got there, that was your responsibility under the contract, wasn't it? [63]

A. Yes.

Q. Now, one cause of the rocks getting down, or I remember three causes, one, sometimes you would blast and they would happen to get over on the track one way or the other; that is correct, isn't it?

A. Yes.

Q. Is that correct?

A. Yes.

Q. And another time, or the times they would drop out of the shovel or fall after they would get out of the teeth, and that would happen, and you expect a little of that, don't you?

A. Yes, normally.

Q. Yes, it is normal operation?

A. Yes.

Q. Then the other time would be, then, ravelling or unravelling of the rock, and I think you figured that there was about 25 per cent of that might be due to unravelling rock. Well, in working in that kind of a territory, do you always have unravelling rock? Are you accustomed to that?

A. Not so much as there.

Q. But you are used to it?

A. You will have a certain amount.

(Testimony of Hilding F. Lind.)

Q. You figure that in your contract you have to take that into consideration, don't you?

A. That cleaning off, of course, we never billed—— [64]

Q. Excuse me now. I will ask you for a direct answer. Please tell me whether you figured that in your contract.

Mr. Denecke: If you know.

The Witness: Well, I do not know for sure.

Q. (By Mr. Powers): Let us refer to the contract, then. You expected trouble when you got up there from material running down on the track and doing damage, didn't you, when you bid on the contract?

A. Doing the damage, no.

Q. You had a contract, I imagine, didn't you?

A. Yes.

Q. I will call your attention to this portion on page D-6 between Stations 691 plus 85 and 714 plus 50, Unit B, "The roadway excavation involved is in such close proximity to the railway company tracks that some interference with the continuous operation of the railroad and possible damage to its facilities would seem to be unavoidable."

Now, you had this contract before you when you figured those prices, didn't you?

A. Yes, but most of that—that is not damage. In other words, we did not anticipate the damage. That is why we blanket it and cover it.

Q. "At this or any other points where similar conditions exist, the contractor shall keep the engineer and the railway company fully informed

(Testimony of Hilding F. Lind.)

in advance of his plans and shall cooperate in [65] their modification and execution to the end that such unavoidable interference and/or damage may be held to a minimum. Railroad operation shall be restored at the earliest practicable moment either by temporary shoofly construction or by restoration of the now existing condition. Any damages or costs involved which result from such construction operations shall be at the expense and responsibility of the contractor.”

Is it not a fact that when you bid on this contract that you knew or estimated the damage that you would have along there?

A. No, we never put anything in for damage on the railroad track.

Q. I will ask you, now you testified here in the beginning, Mr. Lind, that this extra amount—you got two different rates there on this unit that we are talking about? A. Yes.

Q. One was \$1.02 per cubic yard, is that right?

A. Correct.

Q. And the other was \$2.00 a cubic yard, practically twice as much; was it not? A. Yes.

Q. As I understand your explanation of that is that you had to have that extra money in order to take care of building up the railroad or protecting the railroad with planking or something; is that right? [66]

A. Well, no, all of the entire mile and a half of the detour is—although the detour was a mile

(Testimony of Hilding F. Lind.)

and a half long, the detour was put in with this class D excavation. In other words, we put in the timber when we put in our price, when we arrived at our unit price. The lower end of the job, as I explained to start with, is pretty much dirt, and the upper end is quite a lot of dirt, and most of the rock on the job is in the center of the job, the biggest portion which was over the railroad track. That is one reason for the additional money, is the fact that there is so much more rock to shoot there. The first mile we had very little rock, and the last half mile we did not have as much rock.

Q. It was to take care of that extra?

A. It was to take care of the extra mile and a half detour.

Q. It was to take care of the extra cost; was it not?

A. In maintaining the traffic, because our traffic and the railroad being underneath, it was automobile traffic going through every thirty minutes, and then the traffic was going underneath and you couldn't work because it was too dangerous, and that is why we had the cost.

Q. Well, you actually were putting that unit price in in order to take care of damage; were you not? A. Not damage. We didn't—

Q. You are figuring—

A. We didn't figure on damage; we figured on the percentage [67] of time worked.

Q. Let me call your attention now to the contract which you were figuring on. A. Yes.

(Testimony of Hilding F. Lind.)

Q. I am reading from page D-9, 24-3.10 and 24-5.1 and the schedule of your bid in back under 24(5), under those two provisions, I will put it that way, is where you would make your charge of \$2.00 a yard. Now, that correctly relates to the matter of damage?

A. Damage caused occupationally, yes, but not accidentally. In other words, if I might explain something.

Q. Yes.

A. We will take, for instance, that we are shooting, we will say, at Station 714, and we know, we do know that there is going to be some rock going down there on the railroad track, so we go in there and we plank that track and we put in four feet of dirt, haul four feet of dirt on top of it. Then we go ahead and we shoot. Well, we will say that two hundred yards falls on that track. We have to remove that rock. The expense, in the first place, of protecting the track is in our bid, also the expense of moving this ten or twelve yards off of the track that falls in there, is our expense, and the removing of this protection, but not the damage because there is damage that was anticipated because we covered it.

Q. Do you mean to say, Mr. Lind, that you did not anticipate [68] any damage to that railroad track?

A. We only—we did charge damages to tracks before we put on a hundred thousand yards or something like that.

(Testimony of Hilding F. Lind.)

Q. Excuse me, but let me ask you this question. As an engineer, and in the nature of that terrain and that job, did you think that there would be no damage on that track from your blasting?

A. A very small part of it if we protected it. We did not have it in our bid.

Q. Did you or did you not expect damage to that track in the work you were going to do?

A. Maintenance on the detour, from the detour.

Q. Just answer correctly, yes or no, if you will. Then you can explain anything you want to.

A. Yes, I imagine we did expect some, very little, very little.

Q. Why, of course, you did, and you put in this bid for \$2.00 per cubic yard?

A. That was not for any damage because I helped make out the bid, and I know we did not have it there.

Q. What did you think this meant, that this contract would be performed by methods which will result in the least possible damage to the adjacent railroad and to the existing road? Didn't you think—didn't that mean there was going to be some damage?

A. Well, if I could go on—that is true in every job we do [69] in construction work. I think you are familiar enough to know that, too, and that is when you take a job here in the city, the streets of Portland, you realize that you may do some damage to some adjacent building or something, and you take insurance for that matter, but you

(Testimony of Hilding F. Lind.)

do not put in an additional. You figure it as hazardous and you may have to carry on hand some timber or something to protect the windows that you possibly—but you bill the insurance company for it later.

In every job you anticipate a certain amount of damage in the construction work.

Q. Well, now, the very basis of the contract, the basis demanded under this provision we are talking about, provides you shall figure for the damage.

A. Every job is that way. I never seen a job—

Q. Just a minute, every job is not that way, if you will excuse me.

A. Take any of these other contracts, I think you will find the same thing in some of these other contracts.

Q. Here you have got a governmental contract that is asking you, or telling every contractor that works on that job, first that it is unavoidable to have damage to the railroad track?

A. Yes, they think it is unavoidable.

Q. Well, they tell you that.

A. Yes, but I have my own opinion as to what is unavoidable or is not. [70]

The Court: I do not think we are getting any place.

Mr. Powers: I want to get down to this.

Q. Now, after that, then, you are asked to—you are required to repair any damage that occurs?

A. That's right.

Q. When you are doing that work?

(Testimony of Hilding F. Lind.)

A. That is right.

Q. When you blast and do the work in close proximity to the track? A. Yes.

Q. Now, your testimony is that that has been, that this occurred when you worked in close proximity to the track; is that true?

A. In most cases, yes.

Q. Then it tells you in the Basis of Payment, which is the way you figure out the bid, that you shall add to your unit price such amount for full compensation for all the special work necessary in blasting and excavation of material to prevent what, to prevent damage to the railroad and any work necessary in removing debris unavoidably dropped on the roadbeds of the railroad and existing highway and for the correction of any damages to those facilities or to the telephone and telegraph lines.

Now, there is the very basis that you were putting your bid in, and you put your bid in on the basis of \$2.00 instead of \$1.02? [71]

A. No, that is not the reason at all.

Q. I am reading from the contract. It says "Basis of Payment." They are asking you to make a bid on the basis, then, to put your bid in at \$2.00?

A. Yes.

Q. After reading this, and they are telling you what to do; is that true?

A. Well, every contract is the same. You are liable with any job; that is correct.

Q. I won't argue about it.

(Testimony of Hilding F. Lind.)

A. They call your attention to a dozen things on jobs. You do not necessarily bid them.

The Court: I understand in answering a statement by Mr. Denecke you indicated that about one-third of the job is a straight and regular job?

The Witness: Almost two-thirds.

The Court: That was one-third of the mile that was not near the S. P. lines, and I think you were building new roads there; is that right?

The Witness: Your Honor, there is almost—I would say there is, yes, it is just about a little over a third, probably, would be ordinary construction.

The Court: What was the unit price on that portion of the job, or was that figured that way?

The witness: Yes, it was. There is two— [72]

Mr. Denecke: The prices for the bid are in this contract, your Honor. Can he refer to this?

The Court: Yes, certainly, go ahead.

The Witness: It is \$1.02 for A excavation, and I think \$2.00 for B, isn't it?

Mr. Denecke: I do not know.

The Court: One price is \$1.02½.

The Witness: \$1.02, yes, two cents, that is for the one section, and \$2.00 for the other section.

The Court: One section is \$1.02, and the other two sections are \$2.00?

The Witness: No, there is just the two sections. There is what they call A and B classification, but some of those—there is one thing that probably the insurance company does not know, that I would

(Testimony of Hilding F. Lind.)

say fifty per cent, or almost fifty per cent, of our bill is on the straight \$1.02 material.

The Court: The class B job work includes the work done where the old road was relocated and the detour constructed?

The Witness: It is on the railroad track below, yes.

The Court: What is the last third?

The Witness: Well, the last third, that is——

The Court: Where you came off the S. P. lines and off the highway?

The Witness: S. P. lines off the highway, yes.

The Court: And on those two classifications you charged [73] \$2.00?

The Witness: Just charged the \$2.00. It goes by stations, your Honor, starting at Station 700 to Station 683, which is only two thousand feet, we got \$2.00 a yard. Everything else was \$1.02.

The Court: Did you not use the pilot cars throughout for the mile and a half?

The Witness: Yes, sir.

The Court: On page 14 of the exhibit to which you have been referring you talk about one Station 700.

The Witness: Yes.

The Court: In that discussion you called attention to the fact that this additional or the additional charge resulted from the fact that you could only work your men about half the time?

The Witness: That is right.

(Testimony of Hilding F. Lind.)

The Court: During the eight-hour shift they only worked about four hours?

The Witness: Correct.

The Court: And also the pilot car?

The Witness: Cost of the pilot, yes.

The Court: Did you not have that same cost on work done under classification A?

The Witness: No, we did not, not in all of it, your Honor. We had no pilot car there at all, no detour. [74]

The Court: In other words, you built the road in sections? You would finish section A which——

The Witness: No, our pilot car——

The Court: Or between certain stations?

The Witness: No, but you see, the entire length of the job actually, I think, was four and a half miles, but the detour only covered a mile and a half or a little less. The detour didn't run—we didn't run a pilot the full four miles.

The Court: Under the contract in question here, you had two classifications for the mile and a half, A and B; isn't that right?

The Witness: A includes also both ends, included all of the job excepting two thousand feet, approximately. This B only covered the two thousand feet or so where we go the additional money.

The Court: Two thousand feet out of a total of approximately six thousand feet, or it is a mile and a half, about seventy-five hundred feet?

The Witness: Yes.

(Testimony of Hilding F. Lind.)

The Court: And the rest of the three miles was done on a different contract?

The Witness: No, it was the same contract. It is all the same contract. There is actually four miles of road, and there was, you might say, three and a half miles, better than that, three and a half miles of that was in this \$1.02 rock, there [75] is only about two thousand feet of it that is in the \$2.00 rock, and a lot of these expenses that we have spent in here are not in that area where that \$2.00 rock is, your Honor. It is in accidents that happened on the other sections, as a result, you see what I mean?

The Court: Under the A job?

The Witness: Under the A job, although we didn't get any additional money for it.

The Court: The difference between the \$1.02 and the \$2.00 you say is in the cost of the pilot car and the fact that you could only work your men about half time?

The Witness: That particular section there for the two thousand feet you could not work at all when traffic was underneath you. You couldn't work at all.

The Court: And also the fact that—

The Witness: But in the other sections they could.

The Court: —if you were working with rock it was more expensive?

The Witness: That was the hardest rock we had. In fact, that is on the basis of the damage right there at that particular point. It is the hardest rock in the job. That is where the cost came in.

(Testimony of Hilding F. Lind.)

The Court: You only anticipated that you would have to spend money to cover over the line, but you did not anticipate that any damage would result from the fact that there was a [76] fault or a seam and the amount of the rock that fell from the shot would greatly exceed your anticipated figure?

The Witness: That is right. Most of these jobs, in the first place, the way I look at them, when we bid them, that is the reason we carry insurance is we do know that accidents will happen on the job. We do not anticipate each. We anticipated a great expense in running the detour, a great expense due to the fact that there would be so much delay in shots. We could shoot small shots, a lot of holes, without any great quantity of rock, hold down on our powder, and that is where we anticipated the expense, but we did not anticipate that if we spent this money that we would have a lot more damage over and above any other charge, although we do recognize the fact that occasionally there is damage because that is why we carry insurance as we do on all the jobs. We anticipate a certain amount of damage, but we feel our insurance covers that.

The Court: Go ahead.

Q. (By Mr. Powers): Well, now, I made a summary. You say about half of this is on A as distinguished from unit B. Unit B is where you charged \$2.00 a yard?

A. Yes, I was guessing when I said——

Q. Yes, and quite a loose guess, was it not?

(Testimony of Hilding F. Lind.)

A. No, I don't think I could be off too terrific.

Q. Well, I have it down to the first \$28,000 that you have presented and actually it figures out under A that \$4300 was [77] asked.

A. What stations do you go from?

Q. I go from the first \$28,000 list of stuff you put in.

A. By the stations, what stations do you start?

Q. Well, we start here at 685. That is where it starts. You have the contract before you.

The Court: Well, I do not think that means anything, Mr. Powers.

Mr. Powers: That is right.

The Court: Another bill may have it all at \$1.02¹/₂, and the third bill may have \$2.00. It all depends on the stations you have.

Mr. Powers: We have taken only on our \$2.00 per cubic yard we have previously made——

The Witness: It starts on 683 and goes to 714, doesn't it?

Q. I believe so.

A. So it is only—well, now, let's see. I do not find your 24-2.

Q. Let's see. I have it marked here. Here it is. This does not refer only to unit D but refers to where you got blasting.

A. Yes, well, that isn't anything—I would not want to say until I get to it, but I know that a great deal—in fact, I am very much surprised that there is not much more than that, but I do know a great

(Testimony of Hilding F. Lind.)

deal of this is on the \$1.02 which we consider a normal job. [78]

Q. You did blasting on that, too, didn't you?

A. Oh, yes, same type of work.

Q. Yes, up above the railroad track, too?

A. Yes, the conditions were pretty much the same. The only thing was that in some cases that rock was not as hard there as it was over this particular spot. That is why we didn't get the money for it that we thought we would have to get for the other.

The Court: Are you almost through, Mr. Powers? Is Mr. Lind coming back tomorrow?

Mr. Denecke: He does not want to, your Honor, but it seems to me pretty much necessary that he be. I would like to have him here when some of these other witnesses testify.

The Court: We will recess until nine-thirty tomorrow morning.

(Thereupon, the trial of the above-entitled cause was recessed to June 2, 1953, at 9:30 a.m.) [79]

June 2, 1953

Additional Appearance:

ROBERT T. MAUTZ,
Of Attorneys for Plaintiffs.

Morning Session

(June 2, 1953, at 9:30 a.m., trial resumed pursuant to recess duly had.)

HILDING A. LIND

recalled, testified as follows:

Cross-Examination

By Mr. Powers:

Q. Mr. Lind, there was a very steep slope along this place, especially where you were using the track for detour; was there not? A. Yes, there was.

Q. On that slope was there loose rock, things of that sort, before you started to work?

A. There was some, yes.

Q. Did your contract include clearing that and keeping it clear from the track when it rolled down?

A. Yes.

Q. That was part of your work when something rolled down, that was included, anyway that was included in your contract. We have some photographs that are marked, your Honor.

I will hand you Defendants' Exhibit 114 for identification. Can you identify that, please?

A. Yes, it looks like at Station about 700-685.

Q. Is that a fair representation?

A. Well, this is a ravelley type of rock that I mentioned. This [80] isn't the—that is some of that ravelley rock.

Q. Ravelling and loose rock on there. The hard rock is the other—

(Testimony of Hilding F. Lind.)

A. Yes, this was not solid rock, you see.

Mr. Powers: We will offer it in evidence.

Mr. Gearin: We have no objection.

Mr. Gearin: No objection.

The Court: It is admitted.

(Photograph previously marked Defendant's Exhibit 114 for identification was received in evidence.)

Q. (By Mr. Powers): I hand you Defendant's Exhibit 115 for identification. Can you identify that?

A. This, I think, starts about 675 and goes to—it is looking upstream and probably was about 650 or 655.

Q. Is this part of the detour that you are talking about?

A. This is part of the detour, but we had very little trouble in this section.

Q. But it is part of the detour? A. Yes.

Q. One hundred twelve, that is some more of it?

A. Yes, this is the trestle.

Q. Where is that located?

A. 675, Sardine Creek.

Q. That is Sardine Creek? [81]

A. That is where the train went over.

Q. And 113, that shows some more of the track, does it?

A. Yes, but this is way up east. There is no trouble here at all. That is a fill.

Q. This was no part of the detour?

(Testimony of Hilding F. Lind.)

A. Yes, that is part of the detour, but this is all fill. This is not the cut, so there is no trouble here at all.

Q. What is this rock down here (indicating)?

A. Well, this is from the fall. This comes up in layers, and this is a little riprap that is on the bottom.

Q. Whatever gravel or rocks come down, you take them off, do you?

A. In this case, there is very, very little comes off because this rock is placed in layers. This is not from the top or anything.

Q. This is 111.

A. This is almost the same as the other picture.

Mr. Gearin: Same one.

The Court: It is just past Sardine?

The Witness: It looks like the same, that one there, quite a lot alike. It is about the same station.

Q. (By Mr. Powers): What about this one?

A. Oh, yes, this is way up by, almost Station 580. This is the detour—this is not the detour here (indicating).

Q. That is a fair representation of what it [82] was?

A. Well, it had been widened out. It was an old county road there.

Q. It shows the general lay of the land?

A. Yes, this is the highway, and this is the detour.

Q. This is the same in this picture in this vicinity as the other one except a different picture?

(Testimony of Hilding F. Lind.)

A. Yes, that is the fall there.

Mr. Gearin: One hundred seven?

The Witness: I do not think there was any trouble here at all.

The Court: It is the same picture?

Q. (By Mr. Powers): Same picture?

A. Yes.

Q. Well, excuse me, this is not on the rock, this rock is on the track and that is not, I think.

A. Yes.

Q. That is the difference?

A. Well, you see when——

Q. It looks like the same rock? A. Yes.

Mr. Gearin: It might be taken from a different view.

Q. (By Mr. Powers): It could be the wrong track?

A. Yes. It might be the same rock a few minutes later and the truck come off.

Q. Here is 101. [83]

A. This is Station 600, and that is where the detour ended. That is the fill here. This is all fill.

Q. What kind of a rock do you call that?

A. This, we had a slate in this particular spot here.

Q. You did?

A. It did not come down to the track, but it slid. This is very soft rock.

Q. Is that a ravelling-type rock?

A. No, no, that is not. That is soft.

Mr. Powers: We will offer these in evidence.

(Testimony of Hilding F. Lind.)

Mr. Gearin: We have no objection.

Mr. Denecke: When were those taken, Mr. Powers, approximately?

Mr. Powers: Well, I presume in 1948.

The Witness: Those were taken shortly, either late in 1948 or in the spring of 1949, because that is the last sections we built in the entire road.

Mr. Powers: I thought it was 1948, could have been in early 1949.

Mr. Denecke: No objection.

The Court: They may be admitted.

(Photographs previously marked Defendant Hartford Accident & Indemnity Company's Exhibits 101, 107, 110, 112, 113, 114 and 115 for identification were thereupon received in evidence.) [84]

Q. (By Mr. Powers): Now, Mr. Lind, in bidding on this job did you give any thought to doing the construction work in any other manner than the way you carried it out? A. No.

Q. Are there alternative ways in which roads of this type can be built?

A. I don't think so, not there. If I would do it again, we would do it the same.

Q. What is a pioneer road, when you build a pioneer road?

A. Oh, a pioneer road is just usually to get into places that you—there are no roads in already. In other words, it is usually in native country where

(Testimony of Hilding F. Lind.)

there are no roads, and you build a road in in order to go to work.

Q. Where you make a new road?

A. That is right.

Q. And you made a new road here, didn't you?

A. No, it is the relocation. The first two miles it, you might say—the old road ran directly down the middle of where the new road was going to be located so we did not have to pioneer those first two miles. We had no pioneering to do.

Q. You did build some new road here; did you not? A. Yes, on the east end.

Q. In building a pioneer road, that would be more expensive, would it not, from the way you carried on this operation?

A. No, not necessarily, because in most cases I think it is [85] contrary to that. A pioneer road, if you build a pioneer road you build your road in a location that, on high cuts, and you build your pioneer road so that you start at the top, and your pioneer road is part of your actual work, while if the road is already through there it sometimes is placed where it is not doing you any good. It does maybe more harm than good due to the fact that you cannot pioneer above it. You do not have room.

Q. I was concerned with cost now.

A. I know.

Q. What about cost? Would it not have been more expensive by far to build a pioneer road here where you made this new road than the way you did it?

(Testimony of Hilding F. Lind.)

A. In some cases it would, but in some cases it would not.

Q. What about the back-sloping? Can you explain to the Court what is back-sloping when you are building roads in those mountains there? What do you do when you back-slope?

A. You mean the time for sloping the backs. Well, you start up on top, as a general rule, and you bring your slope down as you come. In some cases, why, if there is no place, it is too steep to get up there, you wait until you get a roadbed, and then you slope it with a dragline or something to pull it down.

Q. What effect does back-sloping have with respect to falling rock where you are on a hillside? Does it tend to prevent [86] falling rocks or rocks from falling?

A. After the highway is done, yes.

Q. Did you carry out back-sloping along this road that we are talking about, this unit B and so on?

A. We did very little back-sloping on the first two miles of that road due to the fact that we almost had to have the road-bed in order to back-slope. In other words, it is a too-thin slice coming off. What we originally did there, we let our slopes go pretty much until we went over there to grade, and then we had a forty-foot roadbed. Then we came and back-sloped after that.

Q. If you had back-sloped before, would it have prevented some of this damage?

(Testimony of Hilding F. Lind.)

A. Might not happen if you back-sloped before, but there was not room.

Q. Was there some criticism because you did not back-slope from the Bureau of Roads and the Engineers, as you went along? A. No.

Q. None? A. No, I think not.

Q. That would not have made any difference?

A. No, in fact, you could not have back-sloped the first two miles there. You couldn't get your slope——

Q. What area, which unit is that, the first two miles?

A. The first four miles, that is A-2, the one that is in question. [87]

Q. Are you speaking about four miles now, or two miles?

A. Well, it is four miles in the entire A-2, I think.

Q. That is right, and you have been referring to two miles. Now, that should be changed to four miles; is that right?

A. Well, I spoke of two miles because the two miles are the rock, that is in solid rock, and in solid rock you don't—your slope, your sloping question is not too important because you have to take the rock out in order to have something to slope, and you cannot slope the bank until the material is out.

Q. The only way you could take rock out of here was by blasting it; was it not? A. Yes.

Q. There was no other operation that you could carry on to get that rock out of there, was there?

(Testimony of Hilding F. Lind.)

A. No.

Q. Then where you blast, and you are up high, and if you have a steep enough slope, why, where does that material go when it is broken loose? Does it go downhill?

A. Well, that is why I mentioned the fact that we used lifters and went in at grade so that we took the toe out first.

Q. Will you excuse me? If you will answer if it goes downhill or not. Does it go downhill?

A. Rocks normally go downhill.

Q. No other place for them to go, was there?

A. No. [88]

Q. What was at the bottom of the hill in most of these places where the damage occurred; wasn't that the track?

A. Well, no, we worked off the old road. We had the old road we worked off, and then below that was the highway, and below that was the railroad.

Q. At the bottom, not halfway?

A. It was clear to the bottom.

Q. You had the railroad?

A. That is right.

Q. So, if this rolled far enough, the only place that could finally stop would be down on the track?

A. If they rolled off the old road, yes. That is why we worked off the old road.

Q. Well, you were not successful in your operations there to keep the stuff from rolling down on the track, were you?

(Testimony of Hilding F. Lind.)

A. Occasionally some stuff would roll down on the track, yes.

Q. Now, to summarize, Mr. Lind, this material would get on the track from, sometimes from blasting. That is true, isn't it, that is one source?

A. Yes.

Q. And sometimes it would get there from your equipment working around up there and shaking stuff loose, and then sometimes it would get to rolling just from the men walking around, I think you said, if they were around if it was loose enough for that, was it? [89]

A. Yes, it was.

Q. And then it would be steep enough for that, and the other times it would be from the snags that might fall of their own volition, or if something was cut, if the men were clearing up there they might roll down, but that was on rare occasions. Then sometimes you do not know what caused it. It was just maybe through the natural terrain up there or the natural movement of the earth, and if you were home in bed, why, they would roll down; is that correct?

A. I think so, yes.

Q. It is in connection with this latter group, some five or six items, that you figured that you repaired damage for the Southern Pacific without your causing it; is that right?

A. Yes, sir.

Q. And on those particular items, then, you have no contention that they were any accident as far as the Hartford is concerned, or anything like that?

A. Well, I might say that when we bid the job we knew there were—we had to take some protec-

(Testimony of Hilding F. Lind.)

tion. In other words, we put dirt on the track. If we were going to shoot and we thought, and we knew in some cases, that rock would go on the track, we would put dirt on it for protection, and possibly four shots out of five there would be no damage, so, consequently, no bills on it although every day we took rock off the track. It would be occasionally some shot would do damage which we had not [90] anticipated, yet, we would put protective covering on, and those were the only ones that we billed. We never billed for protection of the track or cleaning off of the track after. The only time we billed was when damage was done to the track by some particular rock or a greater amount of rock fell on the track.

Q. Well, then, if you summarize a little further, as I understand it, it would be a matter of your estimating. You knew certain damage would occur, but you estimated it would be less than what actually occurred; is that correct?

A. I would not say that the damage on the entire track—we spent far more for protecting and cleaning the track than we had anticipated, but I think possibly there was more damage to the track than we anticipated, but at the same time we knew that there would be some damage on the track, that type of work, from falling rocks on it, that you could not possibly avoid.

Q. Well, then, it would be—the damage was greater than you thought—I will put it that way—than you originally anticipated? I think that is what you are saying?

(Testimony of Hilding F. Lind.)

A. Well, in some respects it was.

Q. Then, to carry that a step further, when we were looking at the contract here yesterday where this provision was that you could figure your bid as to how much you were going to do this work for, and recognizing that there would be inevitable [91] damage there to the track from rock and other debris, you figured that the damage would be less than what the engineer talked about, as I understood your testimony. You had one view and the Engineers had another; is that correct?

A. No, the Engineers anticipated even less damage than what actually occurred, I would say.

Q. How do you know that?

A. Well, I just think they did.

Q. What? A. I think they did.

Q. Well, now, there were four bids on that job including your own; was there not? Are you not the one that made the low estimate as to the amount of time with a figure that you got that contract under the other contractors; isn't that the reason you got the job?

A. That job was let in four sections, and in this particular section we were the highest bidder.

Q. After you got your equipment in, isn't that true? You say that you were the highest bidder for those \$2.00 a yard?

A. Yes, I think we were. I won't say on the B classification. I know we were one of the highest bidders on that particular section, one of the highest.

(Testimony of Hilding F. Lind.)

Q. Let us talk about the B classification. Will you tell the Court now that you were the highest bidder on the B classification for those \$2.00 a cubic yard? [92]

A. I won't say yes or no to that because I was going from recollection. I don't remember what the other bidders bid. I do know that over the four jobs, we were only \$10,000 low over the three and a half million dollar job. I do know that.

Q. Yes, but when you first went in you were a good bit lower than the others until you got your equipment in; were you not?

A. I don't understand the question.

Q. Well, the first unit, how much lower were you on the first unit that was let; do you remember?

A. All four units were tied together. We either took all four or none.

Q. Didn't you take one after you got in there, after you got your equipment in?

A. They were short of funds and only——

Q. Just say yes or no.

A. I cannot answer the question like that, yes or no.

Q. How can you say you took that, then in advance of the other?

A. We didn't. We bid all four jobs at once and tied them all together.

Q. Well, then, you can say that you did not take one after you got in there; it was not let before?

A. They were all let at the same time.

(Testimony of Hilding F. Lind.)

Q. That is what I was asking you. That is your testimony?

A. Yes, we bid on all four jobs at the same time.

Q. And you got all four jobs at the same [93] time? A. On the combined bid, yes.

Q. You say the combined bid was only about \$10,000 less——

A. As I recollect it, it was about \$10,000 less than the next low bidder.

Q. As the work proceeded along there, you were using about, along about a hundred ties a week because of damage along that track; were you not?

A. A hundred how much?

Q. Ties, railway ties, replacing them, those that got knocked out and jimmed up?

A. I cannot phrase the amount there. In the first place, we put our planking down——

Q. Just stick to ties now, Mr. Lind. I will get through in a hurry if you answer me. Were you not using about a hundred ties a week?

A. I do not know.

Q. Just how many ties were you using?

A. I don't remember now.

Q. Of course, the contract called for a certain type of tie. You had to have certain equipment on the job, such as ties and rails, didn't you?

A. That is right.

Q. Why did you have those ties and rails along that track——

A. Well, I think we went over that yesterday and today.

(Testimony of Hilding F. Lind.)

Q. Just for the one point that they expected this trouble? [94]

A. Well, we put in a half a mile of relocation, too, which called for ties and rails.

Q. That is right, but on the repairs itself you had to keep ties and rails on hand, didn't you?

A. Oh, we kept some, yes, for accidents.

Q. I will put it this way. You kept what the contract required you to keep, did you?

(No answer.)

The Court: Go ahead.

Q. (By Mr. Powers): I will ask you, Mr. Lind, in September, 1947, at the early part of that job when an engineer from the Hartford went down here and saw the operation that you were carrying on, if you did not discuss with him this anticipated damage that would go down from the top of the rocks and state——

A. Well, let me know what the name of the engineer was.

Q. Yes, I am just getting it here, and stated to C. A. Forbes under date—on the job in September of 1947, you discuss in the contract, and you said it was your responsibility to remove the rocks and repair any damage that is done to the track, and that that is what you were doing, and that you understood that it was the responsibility of Kuckenberg and that the insurance company was in no way concerned with that part of the damage that would result?

(Testimony of Hilding F. Lind.)

A. I don't think I ever made a statement like that because I can remember very definitely talking to a fellow, and I told [95] him at that time, I said that we, every day we had a crew down there which cleaned the railroad track prior to the train coming down. We had to go down and clean the flanges. We had three or four men doing it and rolling any loose rocks off, but any damage caused by bent rails, or anything, I never made no such statement that we would fix the railroad track because originally the contract called for the Southern Pacific to fix the railroad track itself if there was any damage. That was the original agreement.

Q. You might explain that to the Court. That was in the original agreement, but the rest of the agreement is that Kuckenberg would pay the railroad for whatever the expense was of repairing that damage; isn't that true?

A. Well, there seems to be there from the first day of the contract, that there was a difference of opinion. We had bid—we had this identical contract on the State job prior to this job, and we had had insurance with the Continental Casualty Company, and it is identically the same contract, and they paid for all that damage on the railroad track that was done. We had not paid any—

Mr. Powers: I move that that answer be stricken as not responsive to the question, your Honor.

The Court: All right, the answer is stricken.

Q. (By Mr. Powers): I was asking you about the terms of this contract, and I can hand it to you

(Testimony of Hilding F. Lind.)

if you want to see it to [96] refresh your recollection, but it is stipulated here that it was up to the contractor to check the railroad against damage and the telephone lines and the roadbed and the ballast and the ties and the track and any work of this character which the railroad was required to do on account of or for the purpose of accommodating the work of the contractor, shall be done by the railroad at the, at the expense of the contractor, and the contractor shall reimburse the railroad upon rendition of bills therefore, for all expenses incurred by it in repairing damage to railroad structures, telephone, telegraph, signal lines, any telegraph lines of the Western Union Company located upon the railroad property and repair the damage to the roadbed, ballast, ties and track.

A. Well, protect, that is true, yes.

Mr. Denecke: Excuse me, what was that question?

Mr. Powers: I do not know.

Q. You were familiar with that part of the contract when you bid on it?

A. That is right, very familiar with it.

Q. Mr. Lind, did you say something happened to your diaries, that you did not have your diaries when you prepared this schedule?

A. No, that particular schedule there is covered by the old diary before I started taking—there was one old diary in 1947 I didn't have. That is true, and I had to go through [97] the time cards. We went through the time cards and took them out.

(Testimony of Hilding F. Lind.)

Q. When did you prepare this schedule that went in evidence? A. When it started.

Mr. Denecke: What schedule?

Mr. Powers: It says on here September 18th and November 26th, 1948. That was about September, 1948, that you prepared the schedule?

Mr. Denecke: In September and November.

Mr. Powers: And November, too, I guess. Then you had some time cards to work on?

A. That is right.

Q. By that time your diary had been burned up in a fire or something?

A. Yes, the office burned down. I think that is probably it.

Q. When did the office burn down?

A. I don't remember when that burned down. I think it was burned down in the fall of 1947, I think it was.

Q. So you had to call upon your imagination to some extent to try to reconstruct to the best of your ability what you thought would have happened; is that your recollection?

A. Well, the time cards carried that out pretty well because the crews that worked on it, when they fixed rails, they put down fixing rails. When they did ordinary work like maintenance, cleaning the track, or anything like that—all that [98] crew was on steady, and those cards, of course—on the cards themselves it says whether repairing or maintenance.

(Testimony of Hilding F. Lind.)

Q. Well, that is true. I do not think we have much trouble with that, but as to what caused the damage to the track or caused the track to get laid up and require this work, your time cards would not show that, of course?

A. No, not particularly.

Q. And that is the part that we and the Court was asking about by the same token as to whether you made investigation and so on. You had to try and think back without the benefit of any kind of records; did you not?

A. Up until reasonably, up until the time of the diary there.

Q. Yes, well, now, what time does that diary start?

A. I don't know. I would have to look at that.

Q. It seems to start here about the 2nd of January of 1948.

A. Then in some cases we have——

The Court: I do not think there is any question here. He is just thinking.

The Witness: Well, he was talking about any other evidence we might give. I was thinking of our progress reports on the job, some of it appeared in that.

Q. (By Mr. Powers): What I was trying to get at, you brought up the contract, that originally the railroad was to do the work and you were to pay them for it under the contract. Now, that contract between Southern Pacific and Kuckenberg was [99] changed, was it not, and you worked

(Testimony of Hilding F. Lind.)

out the agreement here showing that you preferred to do the work; wasn't that it? Kuckenberg wanted to take care of fixing that? He could do it cheaper than the railroad and would not have to pay the railroad—

The Court: I do not understand what this testimony is about, Mr. Powers. Yesterday we determined that the only question here that we were going to decide in this hearing was whether or not these occurrences were accidents within the meaning of the policy. Now you have been talking about a contract. You have been talking about everything else when there is a very narrow issue for us to determine.

Mr. Powers: Yes, I perhaps was wrong, your Honor. I thought it had a bearing to show that it was operational damage that was occurring, rather than accident when they had agreed to do it, but I will pass that.

The Court: I think you have had testimony on that. You do not need to repeat it four or five times.

We will take a recess.

(Recess taken.)

HILDING A. LIND

recalled, testified as follows:

Q. (By Mr. Powers): Mr. Lind, I am going to summarize, or try to. Out of this whole schedule that you have presented and the sums, I have a compilation here for section 12 which is [100] be-

(Testimony of Hilding F. Lind.)

tween Stations 697 and 702, starting with September 8, 1947, and ending with May 19, 1948, which is part of unit B and is 500 feet in length, and making up a total of 32 per cent of your entire claim or \$14,179. Now, that 500 feet, would that be a certain cut, that would be one cut through there; would it not?

A. What was the stations again?

Q. Stations 697 to 702.

A. Well, that was a very, very large cut. There was a lot of yardage in it, yes.

Q. The distance of it was 500 feet; was it not?

A. Yes, approximately; yes, that is it.

Q. That would be part of unit B?

A. That is right.

Q. You had during that period 59 different items of damage on that track; did you not?

A. Oh, I don't doubt it, yes.

Q. On that 500 feet? A. Yes.

Q. They were quite similar in character; were they not? A. Yes.

Q. Now, then, on stations, section 10, which is Stations 678 to 685, that is a distance of 700 feet, isn't it?

A. I do not know what you mean by section 10.

Q. That is section 10 in the contract and it is Stations 678 to [101] 685 that you discussed yesterday?

A. No, those are not the right stations. The B classification—

Q. This is the A classification, A classification.

(Testimony of Hilding F. Lind.)

A. The A classification runs from—B classification runs from 691 plus 85 to 714, and the rest is A.

Q. That is right, this is A.

A. You do not have it all there.

Q. I am just taking this 700 feet.

A. Oh, I see. 678 through 685. Now, let me see, you have to look at the plans because there may have been a couple cuts in there.

Mr. Denecke: I wonder if I could see this compilation, your Honor. It does not jibe with mine.

The Witness: Yes, 682 to 675—

Mr. Denecke: I am not objecting to this compilation, your Honor, but he has made statements here about where these items of damage are included here, and they do not jibe with mine.

The Court: What do your records show?

Mr. Denecke: He has them split down, your Honor, in a way by these sections which we have never considered.

Mr. Powers: What we have done, your Honor, we have taken their itemized statement and we have got together in a distance of 700 feet in unit A, and we find, we have listed here in unit A 34 different occurrences in this 700 feet, and 59 occurrences in unit B, including a distance of 500 feet, and that [102] is all we are saying that here this same thing was happening in this, in those short distances all the time. You can have this. I will give it to you now. I can sit here, and Mr. Denecke can work with me and see what I am doing.

(Testimony of Hilding F. Lind.)

The Court: Where did you find out at what station the accident occurred?

Mr. Powers: We took it from their list that they furnished us here. It starts right here, and Mr. Staats, who is a civil engineer, went over it and made this compilation for us.

The Court: All right.

Q. (By Mr. Powers): Was that one cut?

A. What was the stations again? 672 to what?

Q. No, 678, Mr. Lind, to 685.

A. No, it is a cut for a fill and the viaduct that went in there.

Q. Well, in that it would be a distance of 700 feet, wouldn't it?

A. Well, yes, on the stations, there was a bridge being built right in that 700 feet also.

Q. As I understand it, from the period from August 5, 1947, to March 18, 1948, you had 34 items of damage on the track?

A. I do not doubt it at all.

Q. Mr. Lind, is it not true that Montag had a contract down there, too?

A. A sub-contract, yes. [103]

Q. Did he sub-contract that from whom?

A. From us.

Q. Is it true that Mr. Montag had the same type of damage you were having as you were doing his work? A. Not very much, no; no.

Q. He had the same type of damage, didn't he?

A. No, not—

Q. Not as to the quantity, but the same type?

(Testimony of Hilding F. Lind.)

A. He did no dynamiting or shooting at all. All the shooting he did, we did for him. He was constructing the bridge, and they—their part of the contract was to clean off the slope so that no future rock would roll down on the track later so they barred, deliberately barred material off of the slope, rolled it down, and they had some accidents, I mean some damage there.

Q. It would roll down and do some damage to the track occasionally; is that right?

A. Well, they barred it down in most cases. They had to clean that. That was part of their contract. I think we did their shooting for them.

Q. Where there were damages to the track, did they report it? Did they take care of it?

A. We did some work for them because they didn't have a contractor.

Q. Whatever you did, they would pay you for it, I take it? [104]

A. No, they didn't pay us for it at all because we traded around.

Q. You traded?

A. We never received no pay for that, but none of that is in our bill, any of that work there.

Mr. Powers: I believe that is all.

(Testimony of Hilding F. Lind.)

Redirect Examination

By Mr. Denecke:

Q. Mr. Lind, do you know approximately how much the cost was of establishing and maintaining the detour?

A. Including everything, the maintenance, just the maintenance and the pilot car and the cleaning off of the track, that work that we did on it, it was pretty close to a hundred thousand dollars.

Q. Do you know whether or not any part of that cost is in this particular claim?

A. It is not there, none of it.

Q. Do you know, Mr. Lind, whether or not a substantial sum was spent by Kuckenberg for repair of damage of the track which is not included in this particular claim?

A. Yes, I do.

Q. On Station 714 which you testified to the other day, do you know approximately what the cost of repairing the damage there was?

Mr. Gearin: Just a moment, Mr. Denecke, 714 is what, [105] Mayflower Creek?

Mr. Denecke: No, it is 624.

Mr. Gearin: That is not one of the claims against us?

Mr. Denecke: No, you are out of that.

Mr. Gearin: All right.

The Witness: Well, I don't know because I didn't make out the aggregation there as to how much we spent because I knew it was outside the

(Testimony of Hilding F. Lind.)

scope of insurance, at least the way we had it interpreted, and we shot down approximately—I think the intention was to shoot down about 19,000 yards, or something like that, and I think a total of about 26,000 came down, and we spent probably ten to fifteen thousand dollars removing that rock. Prior to shooting we had put on about six or seven feet of dirt, maybe not that much, five feet of dirt over the track thinking that the track would not be damaged, and then when we had this shot, the terrific weight pushed the railroad out, and we removed all the rock and did the grading and furnished the ballast and hauled from the ballast pit, and the only part I charged against insurance was the actual cost of the track itself, that is, the rails that were lost and the labor. I think we probably spent \$20,000 in that cut.

Q. (By Mr. Denecke): In this particular claim, Mr. Lind, is there any cost inserted for cleaning track on items where there was no damage?

A. No, sir, there is none there. We did that every day. In [106] fact, we had traffic through there every hour on the hour from one end, every half hour on the other, and we were working three or four places along the track, and we would have, always have a man down there to clean the track off prior to the traffic, and then we would wait, and all of that cleaning and none of that is there; that was part of the job.

Q. When you testified yesterday that you put a protective covering of dirt on the track, what is the

(Testimony of Hilding F. Lind.)

fact as to whether or not that was successful or unsuccessful in preventing damage?

A. Well, we knew we couldn't protect it a hundred per cent by putting dirt on, but our damages only amounted to probably a fiftieth part if there had not been something on there, but, occasionally, why, a rock would roll around and such that it would hit in a certain position, and it would break a rail, but most of the time, why, we did not repair rail. Most of the time we were on construction work. I would say about every fifth time, maybe, that you put rock on a track that you do any damage. The rest of the time, why, we didn't have damage.

Q. A great deal of that damage, Mr. Lind, as I understand it, was caused by an occasional rock falling on the track, from equipment working or blasting; is that correct? A. That is right.

Q. As far as this derailment on Mayflower Creek is concerned, did you inspect the trucks of the car or cars that were involved? [107]

A. I did.

Q. You testified yesterday about a thin flange. Was there anything else about the car that could have caused the accident?

A. No, the only thing, it was on a slight curve, and there is always a chance of trucks not turning freely or something like that with a thin flange which might cause the accident, or something like that.

Q. Mr. Krill is in the courtroom there sitting over to my left of the table. Did he come down to

(Testimony of Hilding F. Lind.)

the job and talk to you?

A. Oh, yes, I saw Mr. Krill.

Q. On approximately how many occasions; do you remember?

A. I don't remember exactly. Probably three or four times or two or three times, at least.

Q. Did you discuss with him the damage to the track?

A. I did, but particularly I can recollect the one time particularly about at the damsite cut when I think I talked to him there, and I told him that we—he was saying that he thought a lot of the damage was due to operations, and I said, "Well, there is a lot of it that is accidental," I says, "We have no control over it." I said cleaning the track, taking the—using the maintenance crew, taking the rocks off of the track where no damage existed, why, I felt was our responsibility, but I interpreted it as such that the insurance in the event of a damage, that is why the additional policy was issued for this particular part of the job. [108]

Mr. Denecke: That is all, your Honor.

Mr. Powers: No more questions.

Mr. Gearin: I have a couple.

At this time, your Honor, I have talked to counsel, and they have agreed that I might amend our contention number 6 in the pre-trial order, page 23a, line 22, by the addition of the following words appearing after the word "track" on said page, said section, said line, by the addition of the following: "and delay to trains."

(Testimony of Hilding F. Lind.)

The Court: Any objection?

Mr. Denecke: Your Honor, I was going to examine our bills, which I have not done yet.

Mr. Powers: Page 26?

Mr. Gearin: Page 23, section 6.

Mr. Denecke: It is stated that is the way it was in the bills. If that is correct, we certainly had ample notice, I think.

Recross-Examination

By Mr. Gearin:

Q. Mr. Lind, you know of your own knowledge there that the trains were delayed on many, many occasions; were they not? A. Yes, they were.

Q. And sometimes the trains would be delayed for a period of days?

A. No, we had made an agreement with the— on one particular [109] shot where the, where we shot, we asked that—it was a Friday evening we shot, and they usually worked half a day on Saturday, the train did, and we made an agreement with the railroad company that they would not run a train on that particular day. Then there was one other time when the train was delayed. It may have been days; it may have been two days, and that was when we had a very bad storm up there and the fill went out, and the entire roadbed for four miles was almost impassable for anything, and that was during that storm when we lost a large fill, washed out the railroad track.

(Testimony of Hilding F. Lind.)

The Court: What issue are we talking about now?

Mr. Gearin: Well, the issue here, your Honor, is a part of the—I thought we were going to try yesterday the items of damage insofar as the Southern Pacific Company is concerned. One of the issues which we are going to try here is not the amount but the damages sustained by Southern Pacific as set forth in one of its contentions by way of counter-claim.

The Court: The statement in the exhibit from which he read yesterday indicated, I think, at Mayflower Creek or one other place, that the trains were held up for a period of three days.

Mr. Gearin: That is correct, your Honor. I just wanted to have him testify that there was delay occasioned by their operations. I am not going into that any more.

Q. Referring to the photograph, 107, which you identified before, Mr. Lind, would not rocks of that size roll down, [110] rolling down, coming on the rail, either bend the metal itself of the rail or break a tie?

A. Yes, if it would hit it right, it could.

Q. Yes, and do you know or have you any idea or can you advise the Court, Mr. Lind, of the number of rails that were so broken or the number of ties that were broken?

A. I couldn't offhand, no, because there was quite a quantity of them.

Q. On these items of damage for which you

(Testimony of Hilding F. Lind.)

billed Southern Pacific Company, Mr. Lind, were those caused by accident or by operational damage? Do you understand my question? Were they accidental?

Mr. Denecke: Your Honor, I am afraid we are getting into something here which is just legal terminology. I object to the question.

The Court: Of course, this is cross-examination. These are two alternatives. There is still a third alternative.

Mr. Gearin: Well, I will ask this question, to be fair to the witness, your Honor.

Q. Mr. Lind, you have billed the Southern Pacific Company as follows: The Mayflower Creek washout, the boulder falling on the track at Station 699, and the Sardine Creek derailment. Would you say that those three items were or were not caused by accident?

A. Might I explain that the Mayflower Creek was from the washout, [111] the culvert plugged up. That, to me, would be on nothing you could control, and if you could not control it, I would call it accidental. The boulder falling on the track, if the boulder has been there and nobody—it just automatically rolls down, I would call it accidental.

Q. Do you recall Mr. Clark sitting back there?

A. Yes.

Q. Do you recall that Mr. Clark was injured when one of these shots went off?

A. I don't know whether he got hit with a shot

(Testimony of Hilding F. Lind.)

or not. I thought a rock rolled down on him or something.

Q. Do you recall the damage to the loaded water tank and water track at the time of the Mayflower Creek washout?

A. Yes, I do. In fact, I think we repaired it.

Q. That is right, that was repaired by the Southern Pacific Company. Do you recall that the Southern Pacific Company, in the month of December, 1947, changed a rail which was damaged due to blasting?

A. You mean the section crew?

Q. Yes, the Southern Pacific employees up there, do you recall them doing any work in December, 1947, in the matter of changing a rail?

A. I don't doubt it, but I say I don't recall it.

Q. In other words, you do not deny it, then, do you?

A. No, I couldn't deny it. [112]

Q. Do you recall in June, 1947, a tree falling on a track and the Southern Pacific crew was out there working on it, in which they used some 90 feet of rail?

A. Yes, I do faintly remember that. In fact, I think we helped them out on the deal, if that is the one that I have in mind.

Q. But they had some S.P. employees up there?

A. I think Clark and Ross, the two men, and they usually—as far as concerned any work we did on the track, why, they usually were the section foremen. They more or less ran the crew.

(Testimony of Hilding F. Lind.)

Q. In other words, you provided the men, but they provided the supervision?

A. Yes, they were on the job. As a rule, we didn't have track workers, so they bossed the gang.

Q. The Southern Pacific supplied the rails and the ties?

A. Well, we furnished the rails and the ties, as a rule. We paid S.P. for them, I understand. In fact, we bought our own ties.

Q. Do you recall damage to the sidewalk and handrail on the trestle on the bridge in June, 1947, when they had what you call a BB gang up there working?

A. I think I faintly remember it was a clearing operation, a clearing contractor, if I remember.

Q. Damage to the bridge? A. Yes. [113]

Q. Was the clearing contractor subbing for you?

A. Yes, he was. I think a tree got away from him or something.

Q. Do you recall that in August, 1947, that there was some repair work done to the track by the Southern Pacific Company?

A. No, previous—I think most of this that you are getting here is when we first started. Southern Pacific were doing quite a bit of repair to the track prior to this meeting we had with the Bureau and the railroad company, and then we more or less—it was at that meeting it was decided we would do the repair under their supervision, but I think most of this is prior to that.

Q. Do you recall that on August 23, 1947, the

(Testimony of Hilding F. Lind.)

Idahoan train was delayed and a train was cancelled because of blasting and slides in the vicinity—well, we have our own mileposts, but do you recall that occasion?

A. Yes, I think that is that storm, I think. What date was that, now?

Q. August 23, 1947.

A. Oh, well, that was through this arrangement that we made with the Southern Pacific. That was made before—we have a letter on that. That was made prior to our shooting that we agreed to pay for their not running Saturday. That was all arranged before the shooting.

Q. Now, do you recall any repair work in 1947, repairing of the track of the Southern Pacific Company after blasting? [114]

A. Yes, we had about 20—we knew we would not have enough men to fix it. After the shot, why, I think one of the railroad officials called Albany, and we got a section crew out of Albany. In fact, we fed them in camp. That is true.

Q. Taking October, 1947, do you remember the BB gang came up again in October, 1947?

A. Well, I cannot definitely say I remember that particularly. What did they do, does it say?

Q. I have 30 feet of Number 62 rails, and 500 tie plates, 500 track spikes, 175 track bolts, 170 lock washers, and matters like that in 1947. You do not deny that there was work performed by Southern Pacific with their own employees and materials

(Testimony of Hilding F. Lind.)

furnished as a result of track damage in October, 1947, do you?

A. No, I cannot in October. I cannot understand where they put all them rails. The BB gang, they just work them bridges.

Q. Would the same be true in September, 1947?

The Court: How do you expect him to remember that far back?

The Witness: I do not remember that.

The Court: Bring them on in your case.

Q. (By Mr. Gearin): Do you recall any specific example at all, Mr. Lind, of what you have referred to in the documents that you prepared here where there was damage to the tracks that was repaired by the Southern Pacific Company?

A. Would you say that again? [115]

Q. Do you recall any example or any time at all where damage was done and it was repaired by Southern Pacific Company with their own men and their own material?

A. No, not—I did know that there was some before this meeting, but since then if they had done any repair it must have been emergency, and I was not notified, or at least I didn't know it.

Q. Do you remember or recall on October 13th, 1948, that there was some \$1200 worth of tracks delivered to Kuckenberg by Southern Pacific Company?

A. Yes, I think I remember that.

Q. Do you recall whether or not Kuckenberg ever paid for it?

(Testimony of Hilding F. Lind.)

A. I don't know whether it was paid for. That is out of my department.

Mr. Gearin: I have no further questions, your Honor.

Mr. Denecke: No more questions, your Honor.

Recross-Examination

By Mr. Powers:

Q. You mentioned something about paying the Southern Pacific so they would not run their trains on, what was it, over the week end? What was it, Saturday and Sunday they wouldn't run them?

A. Just Saturday. They didn't run Sundays. They ran half days Saturdays.

Q. Why did you want the train stopped? [116]

A. Well, that particular case is where we were shooting this big rock, and in this one cut we knew that we were going to have the stuff on the track. We covered the track there, but we knew that it would take us a day or so to uncover the track again.

Q. That was only one time that you did that?

A. Well, yes, that was the only time.

Q. You did not do it week in and week out; just that once?

A. Oh, no. That was the only time. We had already made arrangements that it would not go.

Mr. Powers: That is all.

The Court: Is it a fair statement to say that at the time you submitted your bid and at the time you took the job and during the course of the con-

(Testimony of Hilding F. Lind.)

struction you and your principals knew that it was practically impossible to protect against all damage; that some damage might result?

The Witness: That is true, yes, sir, and we thought—that is why the additional insurance was necessary.

The Court: As a result of the precautions which you took, namely, of covering over the tracks, you were in a position to minimize that damage and the damage that actually resulted was only about one-fiftieth of what would have resulted had you not taken the precautions?

The Witness: That is correct.

The Court: And that when you did cover over the tracks, [117] you only had an anticipated damage about one out of every five times?

The Witness: Possibly so, probably less than that.

The Court: That occurred not—this damage resulted not only from blasting, but also from loosening of the rocks that occurred in connection with the use of equipment?

The Witness: Correct.

The Court: All right.

Mr. Denecke: That is all I had.

Mr. Powers: That is all, Mr. Lind; thank you.

(Witness excused.)

Mr. Denecke: Your Honor, that is the only testimony I have on this phase of the case. However, it occurred to me, your Honor, that Mr. Powers has

these witnesses of his here which I would like to—well, I don't know whether he plans to use them on the other phases of the case or not. I am not speaking of the amount, your Honor. He has raised certain defenses here.

Mr. Powers: I thought we were just trying the accident part first.

The Court: He is resting on the accident phase of it.

Mr. Powers: Yes, I have witnesses on the accident part of it.

The Court: We will take a five-minute recess.

(Recess taken.) [118]

HENRY R. STAATS

a witness produced in behalf of defendant Hartford Accident & Indemnity Company, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Powers:

Q. Where do you live, Mr. Staats?

A. 2907 Southeast Hawthorne.

Q. What is your occupation?

A. I am a Civil Engineer.

Q. Where did you get your training for this particular type of work?

A. I am a graduate of the University of Nebraska.

Q. When was that? How long have you been an engineer?

A. Since 1930.

(Testimony of Henry R. Staats.)

Q. What type of work have you been doing since you graduated and started practicing?

A. Well, I have had general practice. I worked for the Nebraska Highway Department, Oregon Highway Department, National Park Service, Army Engineers.

Since 1946 I have been in private practice.

Q. In connection with your practice have you had anything to do with building roads and highways, their maintenance?

A. Oh, I have done some layout work, and I have had some experience with it; yes, sir.

Q. Did you at my request go and inspect this job? [119] A. Yes.

Q. Then you had the contract made available to you and the items of damage as claimed by the plaintiff here? A. Yes, sir.

Q. You made a summary, did you not, of the locations where the damage occurred and the frequencies of occurrence, and so on? A. Yes, sir.

Q. What was this summary made from? Was the list that we gave you the items they were claiming in damages?

A. Yes, sir, I believe it was the invoices of the Kuckenberg Company.

Q. You had this prepared or prepared it yourself? A. I prepared it myself.

Q. You prepared it yourself. Referring now to Section 12, Station 697 to 702. A. Yes, sir.

Q. That would be a distance of 500 feet; is that correct? A. Yes, sir.

(Testimony of Henry R. Staats.)

Q. How many items of damage occurred in that distance of 500 feet? A. 59.

Q. And the total amounts that—that was from the period of September to what, 1947, to May, 1948. Is that correct? A. That is correct.

Q. The total damage was—— [120]

A. \$14,179.09.

Q. Is that part of Unit B?

A. That is part of Unit B.

Q. Then what is this station 678 to 685?

A. Well, that is another section that had a great many occurrences.

Q. Is that in Unit A or Unit B?

A. That is in Unit A.

Q. What length or what section would that be comprised of? A. 700 feet.

Q. How many different items of damages claimed there? A. 34.

Q. That began August 5, 1947, and ended March 8, 1948? A. Yes, sir.

Q. In your inspection of the job and carrying on that, was there any way to get the rocks out other than blasting——?

A. No practical way.

Q. And moving it down? These sections that you saw, what was at the bottom? From your experience where would this rock go?

A. It would go down. It was on a hillside, it had to go down.

Q. What would it go down to; what was down there? A. Well, the track and the river.

(Testimony of Henry R. Staats.)

Q. Was there any other place it could go?

A. Well, in some places there was a little of it that could hang up on a very narrow county road there. [121]

Q. From your analysis here would this be operational in character? Would it be reasonable to expect it to have been caused by operation?

Mr. Mautz: We will object to that as calling for a conclusion.

The Court: I think that is what I have to decide, isn't it?

Mr. Mautz: Yes.

Mr. Powers: You may take the witness.

Cross-Examination

By Mr. Gearin:

Q. Mr. Staats, what would be the natural and probable consequences of blasting on a hillside with reference to the tracks down below?

A. Part of the rock, if there was—except for the little that hung up on the county road, it would go down there.

Q. What would be the distance, the average distance between the rock that would go down below and the track itself? Would it be five feet, ten feet, fifty or a hundred feet? Can you give us the extremes of distance there, Mr. Staats?

A. Well, in some instances it was practically a straight cliff that overhung the railroad, and in other instances it was back maybe, oh, any amount, but it is a narrow canyon.

(Testimony of Henry R. Staats.)

Q. What would you say from your experience in this type of operation, what would you say as to whether or not the damage to the track would or would not be anticipated by the blasting [122] or removal of rocks from the overhang or the uphill side of the track?

A. If it was not protected there would be damage, I presume.

Q. Is there any way known to protect track from damage under similar or like circumstances?

A. I would not be an authority on that. I would not know.

Mr. Gearin: I have no further questions.

Cross-Examination

By Mr. Denecke:

Q. Mr. Staats, when did you inspect this operation? A. In April, 1951.

Q. In April of 1951. The work was completed then? A. All completed, yes.

Q. By that time, places were there—I mean all of the cut and fills were made?

A. Yes, sir; however, I was with the Army Engineers in charge of that reservoir work so I was very familiar with the canyons before then.

Q. Did you have plans of the job with you when you inspected it? A. Yes, sir.

Q. It is possible, is it not, Mr. Staats, when shooting rock even on the side of a hill if the shot is placed correctly and the rock is anticipated, that

(Testimony of Henry R. Staats.)

the rock will merely be loosened and left in place there? A. Theoretically, it is possible. [123]

Q. Well, the bulk of it—if things go right the bulk of it should stay there; should it not, or is that one that you cannot say?

A. I would not, not, I would not qualify as a powder expert to that extent.

Mr. Denecke: That is all, your Honor.

The Court: Any further questions?

Mr. Powers: No more.

The Court: That is all, Mr. Staats.

(Witness excused.) [124]

WENDELL C. STRUBLE

a witness produced in behalf of defendant Hartford Accident & Indemnity Company, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Powers:

Q. Mr. Struble, you were the Resident Engineer on the Kuckenberg job we are speaking of?

A. That is right, I was the Resident Engineer through most of the construction. However, I did not finish it. I was taken off the project in October, 1948, and the work was completed, was not completed until 1949, I think.

Q. Well, you were there from the beginning during that time which includes the time we are concerned with here or that period?

(Testimony of Wendell C. Struble.)

The Court: Resident Engineer for whom, for the State of Oregon?

The Witness: For the Bureau of Public Roads.

Q. (By Mr. Powers): What were your duties there, Mr. Struble?

A. Well, it was the general supervision of construction and the laying out of the work, measuring quantities and determining payoffs.

Q. When the contracts were let, the four contracts they talked about here, what was the difference in the bid between Kuckenberg and the next lowest bidder?

A. Well, we took bids on the—(consulting notes.)

Q. Just state the over-all, for what and how much lower was [125] Kuckenberg in the over-all than the next lowest one on the four contracts as he testified.

A. \$71,600. That is a matter of public record in our office.

Q. Yes, that is right.

What was the nature of the terrain there in the parts where the railroad track was being damaged?

A. Well, it was a precipitous terrain, largely solid rock. The railroad ran concurrently with the highway, and over part of the distance was very close—I mean 15, 20, 23 feet—just clearance for the track, and then it gradually deviated to perhaps maybe 100 or 150 feet away from the railroad track at a higher elevation.

Q. In letting this contract for the construction

(Testimony of Wendell C. Struble.)

of the road was there any provision or any anticipation made for damage to the track which would occur in the operations of the contractor?

A. Not as far as we were concerned; however, we anticipated damage, and we had set up what we thought was the most difficult section, and we estimated at a higher price to take care of the additional cost of construction.

Q. Would that take care of any damage in replacing and repairing track and so on?

A. That is hard to say. I could not answer that because it depends on how much would develop.

Q. Have you had a chance to look at your notes and look at the items of damage claimed? [126]

A. Well, I looked them over yesterday, but——

Q. How frequently when they were in this close proximity to the track would material come down on the track? Was it a daily occurrence or otherwise?

A. It was pretty general. Throughout both the blasting and the digging of the material it was——perhaps there would be some material would come down nearly every day, and maybe some days there would not be enough to make a great deal of difference, but probably some material was lost every day.

Q. Where would that material go to?

A. Well, it would generally go down to the railroad track.

Q. And on the track and around the track?

A. Well, sometimes it would stop there. Some-

(Testimony of Wendell C. Struble.)

times it would go clear over, but it would depend on the volume of the material that came down.

Q. There is a river down below part of it there?

A. The river below the railroad track.

Q. So at times some of the material was deliberately shoved down by bulldozer onto the track and another bulldozer down there shoved it off?

A. Quite frequently there was a bulldozer down there shoving it off, yes, not always, but as cuts were being opened up and there would be no chance to control the material it would spill over, and they would have a bulldozer to remove the material.

Q. That bulldozer would be kept right down there along the [127] tracks, would it?

A. Pretty much, pretty frequent, yes.

Q. Who did you look to to remove that material and to protect the track? Whose obligation was that?

A. The contractor's obligation.

Mr. Powers: That is all.

Cross-Examination

By Mr. Gearin:

Q. Mr. Struble, as a matter of fact, didn't the operations there just generally raise the dickens with the track down below?

A. Yes, they—the track took quite a battering from the operations above.

Q. Yes, and while you were Resident Engineer on the job, isn't it true that many times the Southern Pacific Company by its own force would expend

(Testimony of Wendell C. Struble.)

labor and materials to repair the damage that was done?

A. Well, I think there were one—I couldn't state that because I don't know; however, I think that there were times when the S.P. did send their own work crews in to augment the contractor's forces to expedite the opening of the track.

Q. Is it a fair statement, Mr. Struble, that you remember it being done, but you do not recall the number of times?

A. No, I would not know. I am sure they sent in a work crew when they did work to the Sardine Creek bridge that was damaged by storm. That is one occasion I recall, but just how many more [128] I don't remember.

Q. Do you know that—well, I will ask you whether there were occasions when the trains were delayed by the operations of Kuckenberg Construction Company?

A. There were minor delays to the train, yes, other than the repeated major blasts that we did have, and we notified the train when, in some cases there were arrangements made not to run the train up for the very major shots.

Mr. Gearin: I have no further questions, your Honor.

Mr. Powers: I neglected to ask Mr. Struble two questions, your Honor.

Q. Mr. Struble, did the contractor, Kuckenberg Construction Company here, make a claim to the

(Testimony of Wendell C. Struble.)

Bureau of Roads for these items of damage as extra work under the contract?

A. No, I do not think—not to my knowledge they did. I do not think so, but they could have after I left the project, but I don't think they did.

Q. Well, what about the Mayflower Creek? Do you remember anything about it?

A. Yes, very well.

Q. Was a claim made for that? Was a claim made by the contractor for the extra work at Mayflower?

A. Claim was made at Mayflower Creek, yes.

Q. And was it allowed?

A. It was not allowed. [129]

Q. Why not?

A. It was turned down by our Washington office, and I do not know just what action, what the recommendations were here at our office, but it was turned down at Washington.

Mr. Powers: That is all.

The Witness: I couldn't answer why it was not allowed.

Cross-Examination

By Mr. Denecke:

Q. Mr. Struble, do you remember going to Mayflower Creek at the time when the S.P. was derailed and one car or more went in the river?

A. Not at Mayflower Creek, no. I remember a derailment at Sardine Creek, but not at Mayflower Creek.

Q. At Sardine Creek you remember a derail-

(Testimony of Wendell C. Struble.)

ment? A. Yes, I remember that.

Q. That was in the first part of January?

A. I think perhaps so.

Q. Did you inspect the trucks on the—or the wheels on the car or cars?

A. I inspected, unofficially I inspected it with Hilding Lind. We went out and looked at it.

Q. Did you find that the flanges were thin on the trucks there?

A. That was the, what we thought, that the flanges were worn on a couple of the trucks or tracks; trucks, I guess.

Q. Was there anything that you saw on the rails or roadbed that [130] could have caused a derailment?

A. No, as far as we could see, the roadbed was open and clear.

Q. Mr. Struble, the \$71,600 figure that you gave as to the difference between the Kuckenberg Construction Company bid and the next lowest bid, was that on all four jobs?

A. That is on all four projects.

Q. The total projects amounted to, the total bid amounted to how much?

A. The total bid amounted to—Kuckenberg's bid was \$3,228,177.

The Court: That is not very much over, is it?

The Witness: No, that is quite close bidding, very close bidding, very close.

Q. (By Mr. Denecke): Mr. Struble, you mentioned that some stuff was rolling down the hill

(Testimony of Wendell C. Struble.)

onto the track there quite frequently. On many, many occasions that did not do any damage to the track, did it?

A. No, the damage is generally contingent upon the size of material. If a big rock rolls down, why, it will do damage, where if it was fine or dirt, why, it would probably have little effect on the railroad track.

Q. As far as the rolls were concerned, the only damage that would be done was when one of the big rocks actually hit the rail?

A. That is where the principal damage was done, yes.

Q. And there was planking, was there not, across the road [131] between the rails?

A. That is right.

Mr. Denecke: That is all, your Honor.

The Court: Let me ask some questions.

Examination by the Court

Q. Have you had experience with blasting?

A. Well, not personally; however, I have been acquainted with blasting for 25 years or 30.

Q. In your opinion, can an experienced powder man who has examined the location where they are going to blast and the type of rock to be blasted and the amount of powder that is going to be used, and how it is, how the powder is placed in the rock and all the other factors that an experienced powder man takes into consideration, could

(Testimony of Wendell C. Struble.)

he determine with reasonable certainty the amount of rock that will be moved and where the rock will land?

A. Well, they can tell pretty close, but when they loosen the rock up on the hillside and it comes over at all, I mean where it is above your railroad track, anything, any spillage whatever, will do the damage even though the shooting and the loading was perfect. Anything that would come out of the roadway prism would naturally fall to the railroad.

The shooting was good. They had very competent men to blast these cuts, good experienced men.

Q. Is it a correct statement that it is practically impossible [132] to always determine in advance what will happen?

A. No, I can't say it is, because there is an unstable, that is, faults in behind your cuts, your big cuts, that nobody could determine. Nobody could be 100% accurate.

Q. I used the word "impossible" rather than "possible" so your answer is that it is practically impossible to determine in advance just what is going to happen because there might be seams, faults and other things in the rock?

A. In the character of the material we have on the North Santiam there is a difference in our rock.

Q. Many unusual and unanticipated things happen? A. That is right.

Q. When you blast? A. That is right.

The Court: Any further questions?

(Testimony of Wendell C. Struble.)

Redirect Examination

By Mr. Powers:

Q. Well, I might ask you this question. What was blasted or pulled out of there, it had only one place to go, did it, down on the tracks?

A. If it started to go, it only had one place to go. That is down on the railroad track, yes.

Mr. Powers: That is all.

Recross-Examination

By Mr. Denecke: [133]

Q. Mr. Struble, a great deal of it was caught in certain sections by the road that was already there; was it not?

A. Well, that was true in the very early phases of construction but after the first shooting there was no road there. I mean that became filled up, and there wasn't any road. It was obliterated. The first little shelf or bench after the cuts were opened up would perhaps retain some material, but that was minor.

Mr. Denecke: That is all.

Q. (By Mr. Powers): You say that was minor?

A. It would be, yes.

Mr. Powers: Thank you, Mr. Struble.

(Witness excused.)

The Court: Call your next witness.

Mr. Powers: The other witness is also from the Bureau of Public Roads and he will not be back until this afternoon. He has been out of the City, and I think Mr. Gearin could go ahead. I perhaps won't even call him.

Mr. Gearin: I have two witnesses, your Honor.

The Court: Go ahead.

Mr. Gearin: Call Mr. Roy Ross. [134]

ROY ROSS

a witness produced in behalf of defendant Southern Pacific Company, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gearin:

Q. Where do you live, Mr. Ross?

A. Temporarily at Roseburg, Oregon.

Q. By whom are you employed?

A. Southern Pacific Company.

Q. For how long a period of time have you been employed by Southern Pacific?

A. Approximately eight years.

Q. Doing what type of work?

A. One year as a laborer and the rest of the time I have been a foreman.

Q. Foreman of what type of crew?

A. Track maintenance.

The Court: What type of crew?

The Witness: Track maintenance, sir.

The Court: Track maintenance.

Q. (By Mr. Gearin): You have heard the

(Testimony of Roy Ross.)

testimony about the relocation of the highway here.

Were you down on the job, Mr. Ross, and if so, what was your position at that time?

A. They put the job up for bid——

Q. I mean, is that your bid with the [135] company?

A. The Southern Pacific Company put that job up for bid as a foreman's job with an extra gang, and I was there approximately a year.

Q. During what year, what months?

A. From the first of September, 1947, until sometime in August, about the middle of August in 1948.

Q. Generally, will you describe briefly, Mr. Ross, what the effect of the activities of Kuckenberg Construction Company were with reference to the tracks? I will strike that question and ask a preliminary question. What were your duties up there as foreman?

A. Well, I was to see that the track was clear for the trains, protect the trains so they could get through, and I worked the contractor's men in repairing the track. I used them to help repair the track when available.

The Court: To what issue is this testimony directed? I do not understand it. To what issue is this testimony directed?

Mr. Gearin: Preliminarily, I want to ask him, your Honor, about Sardine Creek, the Mayflower Creek, Station 699, the reconditioning of the entire roadbed. I want to have testimony that he knew

(Testimony of Roy Ross.)

what was going on down there so he could testify to it.

The Court: This is on the question of whether or not Kuckenberg did work for Southern Pacific which was in the nature of maintenance work for the company? [136]

Mr. Gearin: That is right. I think, your Honor, the first item for which claim is made, the Station 620, August 27th, the testimony of Mr. Lind that the tree on the track was caused by their blasting so I am not going to direct any testimony to that.

Mr. Denecke: That is right, your Honor.

The Court: Go ahead.

Q. (By Mr. Gearin): Mr. Ross, do you remember the train derailment at Sardine Creek?

A. I do.

Q. Will you tell the Court just what type of trackage there was and what was around on the ground at the time or just before the time of the derailment? A. Sometime prior to that?

The Court: What date did that happen?

Mr. Gearin: That happened on October 7, 1947, your Honor. It is about page 8 chronologically on the document that you have before you.

The Court: I have it.

The Witness: Sometime before that they had turned a tractor around there and broken a rail in two, brought a cutting torch down there, a derail of 33 feet long, and cut off 16 and a half feet, got another rail that had been broke, cut off 16 and a half feet and put the two pieces of rail together

(Testimony of Roy Ross.)

in order to make a full rail because we did not have any rail to do it [137] with. There were no replacement rails. We put that rail in there, and we were supposed to go over this track with a motor car where we could see it good, but we couldn't get through because there was dirt in the flange, and the motor car would not roll on the dirt, so I used my own personal pick-up, and I drove ahead of the train that night, just stayed approximately three to five hundred feet ahead of the train because there had been—because the train was running about eight miles an hour. I went around a curve, and Mr. Clark, my assistant foreman, said, "What happened to the train?" Well, we stopped in the clear, waited about five minutes. That train did not show up. We went back up there, and there were two cars almost totally off of the road, that is, off of the ties and another car was—the wheels were on the planks.

Q. Did you subsequently thereto inspect the track where they had made this joint or repair work?

A. Yes, with our road master, he is my next highest foreman, with him, and I don't know who else, and we looked and we found that this wheel had clumb off this place where it had been cut in two and welded because the rails didn't exactly match and were—I don't know why they didn't because the angle bars would line them up perfect, but this rail had been bent, and we had to straighten it back with a rail bender the next day and where it lacked

(Testimony of Roy Ross.)

three, around three-sixteenths of an inch, the wheel marks where it crawled off showed very plain [138] where it rolled across the rail.

Q. Who repaired it the next morning?

A. John Clark, and I don't remember whether we had one or two of the contractor's men, and myself.

Q. Do you recall the Mayflower Creek washout?

The Court: I didn't hear the first part of the witness' testimony. Will you tell me about what happened? You went down with your pick-up, as to what repairs were done on this road, I didn't get that.

The Witness: Sometime before the derailment there had been—they had turned a tractor around on the track, and the cleats or Grouzers had caught on the track. They had straddled the rail, and when they turned it, it bent the rail until it could not be straightened up with a rail bender so we got 16 and a half feet which would be one-half a rail, and took another part of a rail, cut off 16 and a half feet, which would make a complete rail, and replaced this rail that had been damaged with the tractor. We put that in there, and we preceded the train then with a motor car supposedly, but the flangeways where the flanges of the wheels on the motor car holds onto the rail to keep it from coming off the rail was full of dirt, and you couldn't roll the motor car so we used our pick-up to pilot ahead of this train running from three to five hundred feet, just keeping away from him.

(Testimony of Roy Ross.)

The Court: I understand that part of your testimony. Was [139] this the first train that went over this portion of the track after it had been repaired?

The Witness: No, your Honor.

The Court: There had been other trains?

The Witness: Yes.

The Court: If this train was going eight miles an hour would a deviation of three-sixteenths of an inch have derailed a train?

The Witness: I am not an expert on that part, but it did go off at—the wheels marks showed where it rolled across the rail. It showed that it did go off at the joint.

The Court: After the accident, you found that there was—at the joint it was not lined up perfectly, that there was a three-sixteenths-inch deviation?

The Witness: Approximately, your Honor.

The Court: Did you inspect it before to determine whether or not there was that deviation?

The Witness: It was impossible to say, your Honor, to inspect all of this because they were covered up with water. There was water and mud on the track until you couldn't inspect every one every day.

The Court: Who was in charge of the job of taking care of that portion of the rail that was bent as a result of the Grouzers having bent it? As I understand, you had a tractor turn around and the Grouzers on the plates bent the rail? [140]

The Witness: That is right, your Honor.

(Testimony of Roy Ross.)

The Court: And then you cut a rail in half to put in a new section?

The Witness: That is right.

The Court: Who had charge of the work of putting in that new section? Did you do it, or did Kuckenberg's men do it?

The Witness: I was there, and Kuckenberg's men did the work, your Honor.

The Court: That is all. I have it all now.

Q. (By Mr. Gearin): Now, Mr. Ross, going to the Mayflower Creek washout, January 7, 8, 9, and 10 of 1948, will you tell the Court what you know about what transpired at that time and that place?

The Court: You will have to tell me the date again, what date?

Mr. Gearin: That is January 7, 8, 9, and 10.

Mr. Denecke: Page 11, your Honor.

Mr. Gearin: The Mayflower Creek washout.

The Court: All right.

The Witness: They had one of those floods that—I don't know whether it is very common there or not, but they did have a flood, a flash flood and washed down a lot of red clay, and it was some kind of small rock that was in this clay that they make a fill out of, and there is—if I remember right, it is a three-hole opening, a little piling bridge. Well, this [141] washed into this little bridge and filled it up except about half of one of the openings. There was no place for that water to go then for the bridge was filled up with this mud, brush, that came down. Then it went down the track and met

(Testimony of Roy Ross.)

the railroad east, I believe it is approximately east there. The water went down the track, washed under the ties, washed out the track and washed out the—we had a gravity feed to a water tank there for the locomotive water, and it plugged it up, and, I believe, took out a section of that. I didn't see it, but the men were talking about that the tank, was, well, they said full of mud. Whether that was to the top or half full I don't know. They said the tank was full of mud, and they put a lot of it in a locomotive, I understood. I didn't see that.

Mr. Gearin: Mr. Ross, you are only to testify, not to what anybody told you or what you didn't see, only what you observed.

Q. Mr. Ross, where did this mud, brush, and rocks that you have described come from that got under this bridge?

A. It came from up above. That was where this fill was being put in across Mayflower Creek, where they was filling this fill, and this flash flood washed it down.

Q. Do you remember—I will say preliminarily, your Honor, the stations that Kuckenbergh used from an engineering standpoint are different from the mileposts or stations of the railroad, and for that reason we had to correlate the two this [142] morning with the witnesses.

Q. Mr. Ross, do you recall, or did you check the maps this morning to find out where Station 699 was on our maps so that you could recall that point

(Testimony of Roy Ross.)

to your memory? Is that what they call "Big Cliff"?

A. That is "Big Cliff," 700, that is in the vicinity of "Big Cliff."

Q. So when we say "Big Cliff," why, everybody knows what we are talking about; is that right?

A. Yes, all the people up there know it, yes.

Q. What happened in "Big Cliff" when it fell on the track?

The Court: What date?

Mr. Gearin: April 9, 1948.

Q. Were you on the job in the spring of 1948? I believe you were, weren't you? It was April 9, your Honor, at Station 699.

The Court: I have it.

Q. (By Mr. Gearin): Do you recall what happened there?

A. They put some dirt on the track with tractors, piled it up there, and I don't know how deep it was for rail protection, but if I remember right it was six rails on the outside and five on the inside. At least there was 11 rails damaged in there and nearly all of the ties had to be replaced. We salvaged maybe one-fifth of the ties.

Q. What happened to cause the damage to ties and rails?

A. Oh, that was when they shot and the rock came down. [143]

The Court: Mr. Gearin, you may be right, but in Mr. Lind's summary he shows damage occurred on April 9th, then another damage on April 10th as a

(Testimony of Roy Ross.)

result of blasting, but if you recall his statement on April 9th, the one for which I believe claim is being made, he says on this particular date there was no work being done on this spot but part of the outside edge of the road fell onto the track.

Mr. Gearin: I'm going to ask him about that, your Honor.

Q. Do you recall any rock or material falling on the track at that place when they were not working on it?

A. They did have one slide there that slid out. I don't know how much rock there was, there was quite a bit of rock slid out on the track. Now, these dates, I haven't got my books, they were in—well, I don't know who has them. Maybe you know, but I don't know who has my books that I kept, but there was a day about that time, that might be just one day that I have told about the wrong day, but there was a day that the rocks slid down there from—just turned loose and slid down on the track.

Q. Had they been working up above prior to the time that that rock slid down?

A. Not at that time, not right at that—

Q. I mean, prior to that time, before that time, Mr. Ross, had they been working by blasting in through there and clearing off? A. Yes.

Q. Mr. Ross, do you recall what was done to the track prior [144] to the time they put the planking in? Were you there at that time they were putting the planking in?

(Testimony of Roy Ross.)

A. They were putting the planking in when I went there.

Q. What was the condition of the ties and the roadbed prior to the time that they put the planking in?

A. Before I went there the section crew was given——

Q. Well, now, you cannot testify to anything that you did not see, Mr. Ross.

A. That is right, I was not there.

Q. You were not there. Did you see any of the roadbed or ties before they put the planking down?

A. Yes.

Q. What was the condition of the roadbed and the ties that you did see before they covered them up with planking?

A. Well, I would say that the track was good for branch line track. It was a good branch line track.

Q. Do you recall where they had the area they called the detour? A. Yes, sir.

Q. What was the condition of the track after they had planked around the area away and after the operations had been carried on there? What effect did the operations have upon the track in the area of the detour? Did it have any effect at all, and if they had an effect tell the Judge what effect they had.

A. Well, wherever the rocks came down they would tear up the planking and sometimes they would break the ties, break the [145] rails, and

(Testimony of Roy Ross.)

they would have to be replaced. The rails would have to be replaced, and they would put new plank back in and haul more gravel back in there.

Q. Did you find any rotten ties there?

A. No, I don't recall that the ties were rotten.

Q. Were you there in April and May of 1949, Mr. Ross? A. No.

Q. Can you give us any idea of the number of rails that were broken or the number of ties that were broken during the course of these operations either on a daily, weekly, or monthly basis? Can you give us any idea at all?

A. It would come more often than—sometimes it would be, it would come more often than others. I don't know what the record shows, but over more than three thousand feet of rail were used, shipped to them for replacement rail while I was there, and when I left there was 62 rails that had been broke that had angle bars put on them. They had been broken in two and the angle bar put on to strengthen them at the break.

Mr. Gearin: I have nothing further.

Mr. Powers: I have no questions, your Honor.

Cross-Examination

By Mr. Denecke:

Q. Mr. Ross, at Sardine Creek there in October, 1947, or whenever that rail was repaired, you stated that you cut off a 16 and a half foot length there, and was the repair done under your [146] supervision? A. I was there, yes.

(Testimony of Roy Ross.)

Q. Well, was your purpose in being there to supervise the work of Kuckenberg's crew?

A. That is right.

Q. The car or cars that actually went off the track there, were derailed, they were about in the middle of a, quite a long string of cars; were they not?

A. I don't just remember whereabouts in the train they were, but they were not right on the front or they were not on, directly on the back of the train.

Q. About how many cars were in that train; do you recall?

A. No, I do not.

Q. Fifty or seventy-five, would that be——?

A. Well, that I would say that that would be somewhere in that vicinity.

Q. Did you examine the flanges on the car or cars that were derailed?

A. I looked at them.

Q. They were thin, were they not?

A. They were worn some.

Q. Were you actually at Mayflower Creek when the washout occurred, or did you come up there a little bit later?

A. Later.

Q. You came up there a little bit later; is that correct? [147]

A. Yes.

Q. Where were you ordinarily stationed, up there on the job or——

A. We had a shack built at Sardine Creek on the opposite side of the bridge from where the rock was.

Q. Did you stay up there during the day, during

(Testimony of Roy Ross.)

the working day? A. Yes.

Q. Either there or out on the job?

A. There or somewhere out on the job.

The Court: What date did that happen, Mr. Denecke?

Mr. Denecke: Which one, your Honor?

The Court: When the washout took place.

Mr. Denecke: January 8, 9 and 10, I think it is.

Mr. Gearin: Seven, 8, 9 and 10.

Mr. Denecke: Seven, 8, 9 and 10 on page 11, your Honor.

Mr. Gearin: May I make a suggestion, Mr. Denecke, to the Court, that you review the page previously, Mr. Lind's previous page of Mr. Lind's notes. He has some comments regarding the cause of the washout on the page immediately preceding it.

The Court: All right, you mean on January 8th, Mayflower Station 577?

Mr. Gearin: Well, if I can look at Mr. Denecke's copy, your Honor.

Mr. Denecke: I think he is talking about two different things there, your Honor.

Mr. Gearin: I am referring to item of January 8th, Mayflower [148] occurring about the middle of page 10.

The Court: Yes, that was at Station 577, I understand. Mr. Denecke, is that the same time that the culvert washed out Lucky Butte in that other case we had?

Mr. Denecke: No, your Honor, I think this is a

(Testimony of Roy Ross.)

little earlier, 1949-'50 I think, was the washout down there.

The Court: This does not seem to be very far from Lucky Butte River.

Mr. Denecke: Well, your Honor, the Lucky Butte is fed by the Coast Range. This is fed by the Cascades.

Q. Mr. Ross, how often is it necessary to service a track such as this particular track with the kind of traffic that runs over it? By servicing, I am talking about the maintenance work that you do.

A. Could I ask Mr. Clark how many men they had on that section up there?

Q. Certainly.

The Witness: How many men did they have, Don? I think he could tell you more about it when he gets up here if you let him tell it.

Q. As far as you were concerned, Mr. Ross, did you do any work on this section of track where Kuckenberg Construction Company was working, other than supervising the repair of damage?

A. That is all.

Q. Was there any other section crew or maintenance crew working [149] doing general maintenance on that section?

A. The crew from Detroit that is on east of there came down and worked from on the east end of it. That would be up around Mayflower, in that vicinity. The crew from Detroit was up three or four times and worked on that west end of it which is what we call Lakeside.

(Testimony of Roy Ross.)

Q. Were they aiding in the repair of the damage, helping——?

A. They were doing both. They did some normal maintenance, and they did some track damage repair. They had the extra gang over from Albany to help in there at the Big Cliff. When that big damage was did there, and I don't know how many times they had them when I was not there, but while I was there they did call them.

Mr. Denecke: That is all, your Honor.

Mr. Gearin: That is all.

Mr. Powers: No questions.

(Witness excused.) [150]

JOHN E. CLARK

a witness produced in behalf of defendant Southern Pacific Company, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gearin:

Q. Mr. Clark, what work do you do?

A. Track work.

Q. For—— A. Southern Pacific.

Q. How long have you worked for that company? A. Since 1928.

Q. Would you be acquainted with the project we have been talking about since yesterday afternoon? A. Yes, part of it.

Q. What times were you there?

(Testimony of John E. Clark.)

A. Well, I was there at all times whenever——

Q. Well, I mean, what times? When did you start to work on that job and when did you leave?

A. Oh, I was there at the first of it, from the first.

Q. When they first started the job?

A. Outside of when I was hurt, yes.

Q. Then I understand that you were hurt, you got your leg broken up there?

A. January 20, yes.

Q. 1948? [151] A. 1948, yes.

Q. How long were you off then?

A. Well, I don't know, I don't remember just how long it was. It was sometime in June when I was struck, latter part of June, somewhere around there.

Q. How long did you stay on the job?

A. Until they quit the train.

Q. Do you recall the Sardine Creek derailment?

A. Yes.

Q. Will you tell us what you know about that?

A. Well, we started down through with the train, was going to go—was going on through with the pick-up.

Q. Why did you use the pick-up, Mr. Clark?

A. Well, the flanges so full of dirt that we couldn't get a motor car down through there.

Q. Whose pick-up did you use?

A. Mr. Ross'.

Q. Go ahead.

A. Well, we went—it is crooked up there, and

(Testimony of John E. Clark.)

we were not staying, getting far ahead. When we would come up on the sharp bends we ran ahead then so that we would not be too close. We got around Sardine Creek, a right-hand curve. We went down the next left-hand curve, stopped and waited, and they didn't show up on this other one, so we went back to see them and found them off the track. [152]

Q. In the vicinity of where they went off the track what is the fact as to what was the condition or prior history of that track in that section prior to the time that they went off; anything happen before there?

A. Well, they had broken quite a few rails, yes.

Q. When you say they broke rails, do you know who we were are talking about?

A. Well, the contractor, Kuckenberg Construction Company.

Q. Did they have their equipment over a stretch of track in through there? A. Yes.

Q. What kind of equipment would they have?

A. Well, they had their tractors over there, their bulldozers, trucks and shovels.

Q. What was the general condition of the track there at Sardine Creek, Mr. Clark, as to whether it was in good condition or not?

A. Well, it was not in too good a condition at that time, no.

Q. I see. Did you know anything about the repairs that had been done just previously to this derailment?

(Testimony of John E. Clark.)

A. Well, outside of we put in some rail there, and we was out of rail, and we cut two rails in half and put them together with angle bars, put them in there.

Q. Did you have personal knowledge of splicing the rail there?

A. Well, I was not right there at the time it was spliced. I was on up above looking at something, and Mr. Ross was handling [153] that job at the time we put it together.

Q. Did you know where the splice had been performed? A. Oh, yes, I know where it was.

Q. Were was that point with reference to where that train went off the track?

A. Well, it was right at the time, right at it where the train went off.

Q. Let's see, you were hurt on January 20, you say? A. Twenty-second, I think it was.

Q. Do you remember this Mayflower Creek washout? A. Yes, I remember that.

Q. What do you know about that?

A. Well, when we got up there, why, the water was coming down there and pouring over the track and down the side of it and rock and mud in the openings.

Q. All right; now, what type of rock or mud was in the openings?

A. Well, it was that clay that we have up in there. I would say there was jagged rock probably the size of your head, as well as I remember.

Q. Could you see where they came from?

(Testimony of John E. Clark.)

A. Well, no, not exactly. They looked like they come from up in there off the highway. They looked like they had been shot, you know.

Q. What was directly above the creek from the bridge there at Mayflower Creek? Do you understand me? [154] A. Not hardly.

Q. Going up the creek from the bridge, had there been any construction work up there and, if so, what kind of work?

A. Well, yes, they was making a fill across Mayflower Creek.

Q. You say that this rock and everything got in the openings of the bridge?

A. That is the way it looked to me, yes.

Q. What happened to the water then, from the creek?

A. Well, the water from the creek went down over the track and down the sides and started washing it out.

Q. You were not there on April 9th. Do you recall this detour, and am I correct, Mr. Denecke, that the fifth item claimed against Southern Pacific, the reconditioning of the roadbed, April and May, 1949, \$2600 item, refers only to the detour?

Mr. Denecke: That is correct.

Q. (By Mr. Gearin): Do you recall what they call the detour, Mr. Clark? A. Yes.

Q. All right, do you recall—do you know, or did you see the condition of the roadway there, the railroad right-of-way, before they put the planking in?

A. Yes, I was there.

(Testimony of John E. Clark.)

Q. What condition was it in?

A. Well, it was a good track, a 15-mile-an-hour track.

Q. I understand that you have got to have different type of [155] track for different type of trains and speed? A. Yes.

Q. What was the condition of the ties; were they rotted or good?

A. They were good ties for that type of track.

Q. What work, if any, had Southern Pacific done to the roadbed before they planked it?

A. Before they planked it the men went in through there and put in ties they figured that would not last much beyond the duration of the detour.

Q. When they constructed the detour I understand they planked it? A. Yes.

Q. What effect did the operations on the detour have upon the track itself, the roadbed, the ballast or ties, would you know about that?

A. Well, I would say that where they was doing their shooting it knocked it out in several places, and going up and down with the equipment would push it out of line.

Q. Did that have an effect upon the operation of the trains? A. Yes.

Q. Do you recall when the contractor, Kuckenberg, reconditioned the area of the detour?

A. I was there when they reconditioned the full area of it, just in places where the track had been shot out, about four or five places, I think it was.

(Testimony of John E. Clark.)

Q. When they got through would you say that the condition of [156] the track they had worked on was better than before, the same as before, or worse than before? A. Worse than before.

Mr. Gearin: You may inquire.

Mr. Powers: No questions.

Cross-Examination

By Mr. Denecke:

Q. Mr. Clark, were you familiar with the track maintenance in this area before construction of the road started? A. About 20 years of it.

Q. How many men were employed on the maintenance of this particular section? Now, I am talking about an area about four miles—how is described on your milepost? Do you know the town?

Mr. Gearin: Just a minute. I am going to ask my engineer about that.

(Discussion off the record between counsel.)

Mr. Gearin: It is by the mileposts, Mr. Denecke. You would have to get a map to tell you the mileposts.

The Witness: That is milepost 746 where the detour was built, just a little over. Milepost 748 is just beyond it.

Mr. Denecke: 746-748?

A. Just east of 746, just east of 748 where they went off the track of the detour.

Q. That particular area, Mr. Clark, prior to the

(Testimony of John E. Clark.)

time that the construction, when the detour was put down, how many men were [157] employed by the Southern Pacific in maintaining that track?

A. Four, that is, four on that section.

Q. What was their job, replacing ties, putting in more ballast, straightening rails; does that about describe it?

A. Well, they didn't do much rail straightening.

Q. I am talking about that road work.

A. Well, just what we call general maintenance, raising it up, putting in ties, general track work such as straightening bolts.

The Court: How many miles of track did they have under their supervision and jurisdiction?

Mr. Gearin: You mean this section?

The Court: Those four men.

Mr. Gearin: They went from 746 to 750.

The Court: How many miles is that?

The Witness: That would be about 16 miles, wouldn't it?

The Court: Sixteen miles?

The Witness: Yes.

The Court: Four men took care of 16 miles?

The Witness: Four men and the foreman.

Mr. Denecke: 746 to where? I did not catch that.

A. 750. That was the entire section.

Q. (By Mr. Denecke): Isn't that four miles?

A. No, that is this whole section. You see, we have our tracks going in sections, and this is what we call the Detroit section, [158] 118, that went from 736 to 750.

(Testimony of John E. Clark.)

Q. 736?

A. 736. Did I say 46? I meant 36.

Q. Well, then, that would be 14 miles, wouldn't it?

A. Yes, 14.

Q. During the time, after the construction started the only work done by you and Mr. Ross was aiding the Kuckenbergs crews in repairing damage; is that correct?

A. Well, yes, I used to go up through there and do some little work like straightening some bolts or something like that, at times when I would see something loose, and throw out rocks, something like that, if there was a few rocks in the track.

Q. Do you remember how many years the detour was on the road—or the planking, the plank detour is what I am talking about.

A. Well, it was put in there in the fall of 1947, I guess, and is still in there as far as I know.

Q. Put in in the fall or summer of 1947?

A. I think it was 1947, I think is what it was.

Q. How long was it used, approximately?

A. I don't know. I think they went off there in the spring of 1948, wasn't it? I don't remember now. I couldn't say.

Q. About a year and a half; was it not?

A. I would imagine something like that. I would not say for sure.

Q. Was there just one crew, or wasn't there two crews that took [159] care of this so-called Detroit section before the work started, before the road work started?

(Testimony of John E. Clark.)

A. Well, there was another crew that went on from 36 on down, yes.

Q. But there was just the one crew between mileposts 736 and 750? A. Yes.

Q. Did you work on the crew prior, on the Detroit crew?

A. No, I worked on the crew below, but we went back and forth along there.

Q. About how many ties per month would you replace? I am talking about before the road work started.

A. One crew? Well, we figure on about 10 ties to the man in eight hours.

Q. I mean, how many would you normally replace in a day or week?

A. Thirty ties or 40; four men, 30 or 40 ties a day. Of course, that depends a lot on where they go in.

The Court: He does not understand, I do not think.

Mr. Denecke: I am talking about before the road work started. Every day would you replace 30 or 40 ties?

The Witness: Oh, no, not every day.

Q. That is what I am asking, Mr. Clark, so take any period you went to work a month, and I am talking about before the road work started, about how many ties would you usually replace?

A. Well, that is a pretty hard question to answer because sometimes we do not put in any. Lots of

(Testimony of John E. Clark.)

times we don't just [160] go out and put in ties all the time.

Q. Say in a month, about how many ties on the average would you replace?

A. Oh, say, a hundred, from 50 to a hundred.

Q. How about rails? On the average, about how many rails would you replace in a month?

A. Oh, gosh, we would not replace a rail every couple years, three years.

Q. How about ballast?

A. Well, not too much ballast. They went through there during the war. That track was all put up in ballast during the war. We did not have to do it any more.

Q. What other type of track maintenance work did you do there before the road work started? You said you replaced ties and rail every once in awhile. What else did you do?

A. Well, just tightening bolts once in awhile, you know, and go along, sometimes, why, when the train keeps going around these curves, you know, just keep crowding and they will make the gauge wider, and we will pull it back into place.

Q. On the Sardine Creek derailment there did you examine the flanges on the trucks of the car or cars that were derailed?

A. Yes, I examined them, but as far as that goes, I am not a car man, I am a track man.

Q. I see. They were worn some, thin?

A. They were worn some, but the car man, I saw

(Testimony of John E. Clark.)

him putting [161] the gauge on, and it was all right yet, although they were worn some.

Q. Ordinarily, did you use a pick-up taking the trains through the detour there? A. Yes.

Mr. Denecke: That is all, your Honor.

Redirect Examination

By Mr. Gearin:

Q. Mr. Clark, while you were there any occasions when the S.P. crews would come up and do work?

A. Yes, we had the Detroit gang there, I think once, and I think I had the Mill City section gang there once or twice, the Mill City section gang was there.

Mr. Gearin: That is all.

(Discussion off the record.)

The Court: Now, does this complete the testimony on the question of what happened on the field, in other words, the testimony on accident or lack of accident except for one additional witness of Mr. Powers from the Bureau of Roads?

Mr. Powers: Either that or I might put Mr. Krill on, and I would introduce the contract in evidence, which would be of some help to your Honor, to see what was anticipated by the contract. If there was no objection, I would offer that in evidence now.

The Court: All right. [162]

(Discussion off the record between Court and counsel.)

Mr. Gearin: Your Honor, may I direct one inquiry to the Court? With respect to the counterclaim of Southern Pacific Company as the only thing we have established, so far attempted to establish the fact that certain materials were furnished and certain work performed by Southern Pacific Company, it is my understanding that the question of that will be reserved and that there will not be necessity for any more testimony and that your Honor only wishes to hear what happened out in the field.

The Court: Yes, if you have a witness from San Francisco who can testify as to the damage or value, and if you have some witnesses from Eugene and if the testimony is not very long, we will hear that.

(Further discussion off the record.)

The Court: We will recess.

(Noon recess taken.) [163]

Afternoon Session—2:00 P.M.

(Trial resumed.)

The Court: Mr. Powers, do you have your additional witness here?

Mr. Powers: No, he is not here, and the witnesses from San Francisco, they get up in this territory frequently anyway, and it is part of their territory, and they like very much to come to Ore-

gon, so I am not going to call them at this time, so we will rest at that. [164]

WENDELL C. STRUBLE

recalled for rebuttal testimony, testified as follows:

Direct Examination

By Mr. Denecke:

Q. Mr. Struble, I would like to call your attention to what happened at Station 699. This was on April 9th. The evidence, at least there has been some evidence that a portion of the old road fell on the track there. Did you see this dirt on the track?

A. Well, I couldn't recall the dates any more, but I do recall that about that station there was a portion of the railroad cut, that is the back slope on the railroad cut, that slipped in on the railroad track.

Q. That was about this time; is that correct?

A. Well, I couldn't—it has been five years since I have looked at those things.

Q. Did you observe those with Mr. Lind?

A. Yes, I looked at it, yes.

Q. Did you know where the debris came from that was on the track there?

A. Oh, yes, it definitely came from the side of the railroad cut, a vertical rock cut that—well, you could see where it slipped off.

Q. Do you know at the time that it slipped whether or not any work was being done in that vicinity by the Kuckenberg crews? [165]

(Testimony of Wendell C. Struble.)

A. Well, I don't just recall what time of the day it slipped, but there had been work in progress immediately above it. I mean we were completing the roadway cut above there and had done work, blasting above, but I don't—I think it came down during the night or early morning, and I do not think the equipment was working.

Q. Was there any vehicular traffic on the road above it there early in the morning or night?

A. No, nothing but construction traffic. The road was not open at that time to highway traffic. The highway traffic was routed on the railroad detour at that time.

Q. Are you in a position to say, Mr. Struble, whether or not in this particular area a train going by on the track there could cause a slide to occur?

A. Well, I do not think anybody could answer a question like that. I do not think—I think that would be impossible, to answer it.

Mr. Denecke: That is all, your Honor.

Cross-Examination

By Mr. Gearin:

Q. Mr. Struble, this slip on the cut that went on the track, there had been blasting in the immediate vicinity, had there not, sometime previously?

A. Immediately above it, yes, sir.

Q. Yes, and isn't it quite true that on occasions where you [166] have blasting on a point adjacent, that sometimes it does not take but very little vibra-

(Testimony of Wendell C. Struble.)

tion or even construction traffic to make a slide start to go or fall some place close by? Doesn't that happen quite frequently?

A. I don't say it happens too frequently below the grade. It happens more often above the area that you are working in.

Q. You could see where it could happen?

A. Nature can do lots of things.

Q. You cannot really say what the cause of that was, can you, Mr. Struble?

A. No, I do not think that—no, I don't know what definitely caused it.

Mr. Gearin: Thank you. That is all, sir.

Mr. Denecke: That is all.

The Court: Isn't it more reasonable to believe that—or is it more reasonable to believe that the falling earth or this slide was caused by the blasting than by the movement of trains below the point the slide occurred?

A. Well, I think it would be reasonable to assume that, yes.

Q. Assume what?

A. That it would be more reasonable to think that it was caused from blasting rather than train movement.

Q. What about natural causes had there been no blasting?

A. Well, I don't know. That railroad cut that we are talking about had been constructed for probably 25 or 30 years. I mean [167] it was—I don't know when the railroad was constructed, but many

(Testimony of Wendell C. Struble.)

years ago, and it has held up throughout that period.

Q. Is it reasonable to assume that if it held up for 25 years that it would have continued to hold up but for the blasting or some other incident of that kind?

A. That I couldn't answer. Nature does lots of funny things. We get slides sometimes where you never think you will get them, and, well, I just don't know. I couldn't answer that, but I do know that it came down.

I do know that we did have that slip off the side of the railroad cut that perhaps took one of the big shovels they had there, I think, the better part of two shifts to take it out, perhaps a couple thousand yards or in that—we didn't try to determine the volume because we decided we would not pay for it. We did not pay for it, so I don't know just what came down.

Q. Tell me what did you pay for and what didn't you pay for it, or how did you determine that?

A. Well, it was—it is just the way our department ruled. If the slide had come above our roadway, we would have paid it, but in that it developed below the area we were working in, we figured it was not our responsibility. That is the way we ruled.

Q. Does that mean that you ruled it was the responsibility of the Southern Pacific? [168]

A. No, sir, it is——

Q. Either the Government paid for it or the Southern Pacific would pay for it.

(Testimony of Wendell C. Struble.)

A. Well, in this case we perhaps ruled that the contractor paid for it because he took it out.

Q. Took what out?

A. He removed the material that slid down.

Q. Was he not obligated to remove that under his contract?

A. Well, he was obligated to keep the tracks of the Southern Pacific open to traffic, and that was an obstacle that had to be taken out before they could move trains.

Q. I think you do not have to determine whether the Government was right or wrong in not paying.

A. Well, we had some arguments about that with the contractors.

The Court: Are there any further questions?

Mr. Denecke: No further questions.

Mr. Gearin: No questions.

Mr. Powers: No.

The Court: That is all.

(Witness excused.) [169]

HENRY A. KUCKENBERG

called as a witness in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Denecke:

Q. Mr. Kuckenberg, you are one of the plaintiffs in this case as one of the partners in the Kuckenberg Construction Company? A. I am.

(Testimony of Henry A. Kuckenberg.)

Q. How long have you been in the construction business?

Mr. Gearin: We will admit Mr. Kuckenberg's qualifications. He is an expert in the field of construction work.

Mr. Denecke: Will you answer the question, please?

A. I have been in business for myself since 1922.

Q. Prior to that time were you in the construction business? A. Yes, about, oh, six years.

Q. Have you had, either as someone else's employee or when you were in business for yourself, have you done work generally similiar in character to this work on the North Santiam?

A. Yes, yes, we have.

Q. What other general projects like that; name one or two of them, would you?

A. Well, we have had hundreds of jobs all over Oregon, Washington, and California. [170]

Q. I was thinking particularly of jobs similar in nature to this.

A. Well, we had a job just two years previous to taking on these four contracts just west of A, let's see, A4-2—no, just west of the first of the four contracts.

Q. That was for the State of Oregon?

A. That was a state contract, yes.

Q. That involved the relocation of the highway around a dam and a reservoir, did it?

A. Well, it was west of the dam. It would be

(Testimony of Henry A. Kuckenberg.)

possibly, oh, four miles west of the dam where this other road is located.

Q. Was the terrain in that area where you worked for the state generally similar to the terrain where this A24, A2 was?

A. Well, generally speaking it was. Some parts of it, some parts of that contract was not quite as restricted as far as the canyon is concerned, but the terrain is practically similar as far as the nature of the material.

Q. Did you inspect this scene of this work prior to the time that you submitted your bid?

A. Yes, we did.

Q. About how often or how many times did you inspect it?

A. I think I was down there twice before we bid it, on two different occasions. One time I think I was down there two days and the other time possibly one day.

Q. Did you OK, inspect and approve the bid that was put in [171] by your concern?

A. Well, we have engineers. Mr. Lind was our general superintendent on that job, and between Mr. Lind and our engineers and myself the bid was made up, and I think it is customary, and I think I did OK the final figures, yes.

Q. This job was bid when; do you recall?

A. Well, as I recall it, it was in February of 1947.

Q. When was the contract let, if you recall?

A. I think it was either April or May. Now, it

(Testimony of Henry A. Kuckenberg.)

took a little longer than normal to let this contract. As I understood it, the funds were not available at the time that the contract was let, and there was quite a bit of correspondence, as I understood it now, between the Bureau here and Washington getting the authorization to let the contracts.

Q. Did you do anything about procuring insurance on your operation of this particular job?

Mr. Powers: We will object to that. That does not go into the question of accidents, your Honor.

Mr. Denecke: It does not do what?

Mr. Powers: It does not go into the question of accident. We have closed our case on the basis we are trying out whether these matters were accidental in nature.

The Court: I suggested a little while ago that Mr. Denecke bring up the rest of his witnesses on this question, and I think he is producing Mr. Kuckenberg and the insurance man [172] at my suggestion.

Mr. Denecke: That is correct, your Honor.

The Court: And that is the reason why I asked you to produce the two men that you have here.

It seems to me that we are not going to be able to determine the scope of the insurance, as to whether or not this is an act within the meaning of the policy, unless and until we find out whether or not the word "accident" as contained in the policy means the very thing about which they are talking. I mentioned earlier that from the legal point of view whatever Mr. Kuckenberg and the

(Testimony of Henry A. Kuckenberg.)

agent for the, or the broker for the Hartford may have agreed upon may be immaterial as far as the determination of this lawsuit is concerned, but I do not want to prejudge that. I want to see what they have to say about it.

MR. POWERS: Well, the two people that actually were on this, if it was a question of interpreting the policy of what an accident is, an occurrence is, we have deliberately kept from bringing two people up from San Francisco. We talked to them this noon, told them until this accident came up, why, they would not come up. These men are something else. Mr. Krill is a claims man and that sort of thing, so we are here on the accident, and I didn't understand this earlier business about it.

THE COURT: I thought you told me earlier that you had a man in Idaho? [173]

MR. POWERS: We have a man in Idaho that talked with Mr. Lind. It was the man, Mr. Forbes, engineer down at the job. We didn't bring him here because it had something to do with the policy, you see. He was not there, and when you mentioned what you have said here about the accident, that it was a matter of repeated occurrences, 59, see, we have devoted our testimony—

THE COURT: Is that a man from Idaho?

MR. POWERS: The man from Idaho was down on the job and had talked to Mr. Lind one time.

THE COURT: I am not interested in that.

MR. POWERS: Yes. Then in addition to that we have two witnesses that we have had going to fly

(Testimony of Henry A. Kuckenberg.)

up, if need be, if we were going into the difference between occurrence and accident. It is a legal interpretation because courts have construed these things, and when we started the cases it was my understanding that, by stipulation of counsel, unless this was an accident no recovery can be had. They have repeatedly stated it in open court, so we have not gone in, and I am not prepared to go into this particular question at this time, your Honor. In other words, if it were held to be not an accident, then there just would not be any lawsuit, as I see it, and I think they have agreed to that.

The Court: What is an accident within the meaning of the policy? [174]

Mr. Powers: Well, the courts have placed a very—they have placed definitions upon occurrence and accident. That is what I thought I would furnish your Honor, a brief on the law on whether these policies have been up and been determined and been considered by the courts before as to what constitutes accidents. We have brought in all the evidence we had that is available as to what went on down there, and we thought from that that the Court could determine whether it was an accident, that these things constituted accident, or whether they were mere occurrences which were reasonably foreseeable. That, I think, is the test laid down.

The Court: Well, I may have misled you on that, but during the year and a half that this case has been before me I have heard a lot of statements. Among the statements that were made was

(Testimony of Henry A. Kuckenberg.)

one that, I think, one of the officials of Jewett, Barton, Leavy & Kern wrote this policy, and I know that they are connected with the Hartford, or maybe they are brokers. Now, at one time I believe that it was the position of the plaintiff that the policy should be reformed. I do not know whether that contention has been abandoned or not.

Mr. Powers: I do not think it has been abandoned, but it has no significance if these were not accidents because there are several collateral questions about notice and that sort of thing, and then their understanding later about the type of policy it was, but, in any event, unless they [175] could show an accident here, why, there is just no liability. I think that is what we practically all agreed to, and that was the purpose, I think, in limiting it at this time to that question.

The Court: Well, I can see if the president of the Hartford made a deal with Mr. Kuckenberg and said, "We will regard these things as accidents," the Hartford would be bound by it.

Mr. Powers: They made no such contention as that.

The Court: Well, I do not know yet.

Mr. Powers: There is nothing in the Pretrial Order or no basis for that. The only basis for it was that they wanted the reformation of the policy, but even with the reformation they do not contend they could recover unless there was an accident.

The Court: Perhaps I have your contentions wrong. I understood that one of your contentions

(Testimony of Henry A. Kuckenberg.)

was the Mr. Kuckenberg and Jewett, Barton, Leavy & Kern entered into a contract in which it was agreed that the policy issued would cover the precise type of occurrence about which you have brought some evidence into court. Is that your contention?

Mr. Mautz: That is right.

Mr. Powers: That is not in the Pretrial.

Mr. Denecke: I do not know, your Honor, whether it goes so far as to cover whether there was an understanding on every specific kind of event that took place there. Our contention is, your Honor, that Mr. Kuckenberg and Mr. Leavy [176] here at the time the policy was written, that Mr. Leavy was studying, and I do not know whether anybody else from Hartford studied or not, this particular contract involved here, and on the basis of that issued and sold the insurance policy that is here involved and to protect against this particular kind of loss.

The Court: Well, I am going to overrule the objection and let the witness testify.

I might tell you that one of the principal reasons why I am letting him testify is that from what I have heard it does not look like an accident to me, and before I require Hartford to bring up their other men to testify on it I will see what kind of a case plaintiff can make out.

Mr. Denecke: Would you read that last question, please?

(Testimony of Henry A. Kuckenberg.)

(Last question read by the reporter: "Did you do anything about procuring insurance on your operation on this particular job?")

A. Yes, we did the job, and we took the specifications to Jewett, Barton, Leavy & Kern, or to Mr. Leavy, and asked him how much it would cost to write this particular insurance, and he studied—as a matter of fact, I think we left the proposal or specifications with Mr. Leavy there for several days. That is customary on every job that we bid of that character. We do that very thing.

Usually the insurance company study it over and go out on [177] the job and look over the hazards and then quote a price on it. Normally, we carry Public Liability and Property Damage for our contracts, but this contract required an additional policy. Now, we had the same policy and the same type of contract with the railroad on a state contract that we had. It just so happened that one of the other insurance companies wrote or had that insurance—I think it was Continental Casualty—and we had perhaps, oh, a half dozen or maybe eight accidental damages of the same character that we had on this contract, and the bills were submitted, and on that particular job the railroad company—

Mr. Powers: I object to what occurred on some other job. We have no way of checking that, your Honor. The policy might be different, and we just have no way of getting down to any specific proof

(Testimony of Henry A. Kuckenbergl.)

or way of disproving a vague statement like that. It would have no bearing here.

The Court: Who wrote that other policy?

The Witness: The Continental Casualty.

The Court: Who is the broker?

The Witness: Tomassene.

The Court: Down at Jewett, Bartlett?

The Witness: No, Tomassene has his own office, but on this particular—on this job here Tomassene had half of the insurance, and Leavy had the other half on these four contracts, but the state job before that Tomassene wrote the bid bond and [178] wrote the insurance, and that was covered in Continental Casualty, but it was exactly the same type of contract with the railroad and the same type of bond was required.

The Court: Go ahead.

The Witness: And on that job, as I say, we had eight or ten accidents, accidental damages of the same nature and character that we had on our four Bureau of Public Roads contracts.

Q. (By Mr. Denecke): Was that damage to the railroad track and right-of-way, Mr. Kuckenbergl?

A. Yes, damage to the railroad tracks, and the bills were submitted to the insurance company, and they were paid.

Mr. Powers: We will object to that, too, unless we see the policy. There is a variation in policies.

The Court: We are just getting the background here. Go ahead.

The Witness: We have always carried that in-

(Testimony of Henry A. Kuckenberg.)

insurance, and there was no reason for us to feel that we would not be protected and covered on this particular job. The jobs are very much of the same character, and we spoke to Mr. Leavy about it. He was informed early in the work of the accidents, and I think around the first of the year or shortly thereafter the Hartford were talking then of canceling the insurance because they told me that they were going to face a big loss down there. Then I think—— [179]

Q. Who told you that, do you recall, Mr. Kuckenberg?

A. Well, I think Mr. Leavy told me that.

Q. Well, now, getting back——

Mr. Powers: Now, I will object to that.

The Court: Who were those that might have told him?

The Witness: Mr. Leavy told me that, and he is a special agent, and the attorney, in fact, for the Hartford. That I know.

Q. (By Mr. Denecke): Getting back to when this insurance that is involved here was first issued, had you dealt with Mr. Leavy or Jewett, Barton, Leavy & Kern prior to this time as far as your insurance was concerned?

A. No, that was the first job that they wrote for us, as far as I remember.

Q. Did you have any discussion with Mr. Leavy prior to the time this insurance was issued about the type of losses or what losses this particular policy would cover?

A. Yes, I did.

(Testimony of Henry A. Kuckenberg.)

Mr. Powers: Just a moment, I will object to that on the basis that they are attempting now to change by parol evidence a written document which is not subject to change by these subsequent discussions and talks. He said he had his talk with Mr. Leavy afterwards, and the policy itself would provide otherwise. You cannot change, an agent cannot change the terms of his policy, and unless something is in writing he could not [180] go around and change the terms of his policy, so we object.

The Court: Was this a conversation after the policy?

Mr. Denecke: Prior to the issuance of the policy, your Honor.

Mr. Powers: His last discussion was subsequent. That is where I got the date.

The Court: Go ahead.

The Witness: Yes, I talked to Mr. Leavy prior to placing the business with him, told him what our experiences had been and how the other companies had handled it, and he told me that any accidental damage was covered by this policy.

Q. (By Mr. Denecke): Did you make any mention to Mr. Leavy of what sort of protection you wanted on this particular job by the insurance?

A. Yes, we wanted full protection for any accidental damage.

Q. Did you go into details as to that damage to the railroad or not?

A. Yes, we felt that we had ordinary insurance, both Liability and Property Damage, but this was

(Testimony of Henry A. Kuckenberg.)

a special policy to cover the damage to the railroad.

Q. There were two policies issued; were there not? A. Yes.

Q. One was to, naming your company, and the other was naming the Southern Pacific as the named assured?

A. I think that is correct. [181]

Q. You paid for both policies?

A. We paid for both policies.

Q. Did Mr. Leavy make any response to you—this is prior to the issuance of the policy—did he make any response to you? Did he make any statements to you as to the coverage of the policy naming—to you of the policy to be issued by Hartford, as far as its coverage for any damage to the railroad or railroad right-of-way?

Mr. Powers: Same objection. The policy speaks for itself. It cannot be varied by parol evidence.

The Court: Objection overruled.

The Witness: Well, he told me it would cover any damage to the railroad tracks, to their rolling stock, or any of the railroad property; that the policy would cover it.

Q. Was that the—was it your intention to procure—

Mr. Powers: Well, object now. You can ask the witness questions, but you are putting words in his mouth now, what his intention was. You can ask what was said.

Q. (By Mr. Denecke): Was it your intention, or what was your intention as to the type of cover-

(Testimony of Henry A. Kuckenberg.)

age that you intended to procure by this particular type of policy with reference to damage to the railroad?

A. Well, we wanted full protection for any damage that was sustained from our operations, to the railroad.

Q. You stated that Mr. Leavy had studied your contract with the Bureau of Public Roads? [182]

A. Yes.

Q. Prior to the issuance of the policy, or did Mr. Leavy at any time state to you that the policy that was issued to you would not cover damage to the railroad?

A. No, he did not.

Mr. Gearin: I think that is a little leading, your Honor.

The Court: All right, he has answered it already.

Q. (By Mr. Denecke): Mr. Kuckenberg, you had occasion to go to this job many times, I take it, during its progress?

A. Yes, I did.

Q. And are you personally familiar with some of the damage that occurred up there?

A. Yes, I am.

Q. On the basis of your experience in construction work, from blasting particularly, do falling rocks on occasions go some great length from the place that the blasting is done?

A. Yes, I have had rock landed, oh, sometimes, oh, 600 feet from where the blasting occurred, and we have had tremors go as far as a mile from the blasting.

Q. When rock was blasted in this particular

(Testimony of Henry A. Kuckenberg.)

area on the side of the slope there, where did the—or what happened to the great bulk of the rock?

A. Well, ordinarily good shooting, I would say you load your holes with just enough powder that you raise your rock or whatever you are shooting, just raise it up enough so that it [183] settles down and you do not lose too much from a shot of that type. You lose a few sometimes, but not too many.

Q. In blasting this particular operation, how did you plan to protect the railroad against damage? I don't mean by insurance or anything else, but physically, in the operation to protect the railroad from damage?

A. Well, we did everything that we could. We covered the track with sometimes as much as four feet of earth to protect it. We built barricades in other places, and other places we would doze up the path so that if rock came down it would stop when it hit this sort of wall that we would build up there with either earth or rock, and we used every precaution that we could to protect the railroad.

Q. This wall that you speak of—

A. Well, it was kind of a dike that we built up. We just dozed the path so that when the rock would come down it would stop. Some places we couldn't do that, but where we could do it we usually did that.

Q. Do you know from your own knowledge from your inspection of the job there, Mr. Kuckenberg,

(Testimony of Henry A. Kuckenberg.)

whether most of the rock coming down there did any damage to the railroad?

A. Well, most of it didn't. That is for certain. A percentage did. I think my statement would be the same as Mr. Lind's that possibly, oh, maybe a very small percentage of it would damage the [184] track.

Q. Mr. Kuckenberg, you have heard all the testimony here, and you know what the issue is concerning whether or not this occurred by accident. Is there anything else that you observed on the job that would be of any aid to the Court in determining that issue?

A. Well, as I have stated, we have carried this insurance for a good many years. We have had damage on railroads. We have had damage on houses from blasting, and the insurance company has always paid on a policy of this sort. This one particularly, as we understood it then and as we feel now, was written to protect any damage to the railroad. On this particular job I have seen rocks that—I have been driving along the railroad track on the detour and have seen rocks coming down the side of the hill, and we were not even working there, and certainly you couldn't figure anything like that happening before you bid a job, and definitely, in my estimation, that is an accidental damage if it comes down and damages something. We certainly didn't stir it up, but it is on our contract, and we are responsible for it, and if we are responsible for it the insurance company takes that

(Testimony of Henry A. Kuckenberg.)

liability off our hands, and that is the way we have always bid a contract, that they are simply taking that off our shoulders.

Mr. Denecke: That is all, your Honor.

The Court: All this testimony has come in subject to your objection. [185]

Mr. Powers: Thank you, your Honor.

Cross-Examination

By Mr. Powers:

Q. You stated in your discussion with Mr. Leavy that he was to issue a policy to cover accidental damage; is that correct?

A. Yes, damage to the railroad.

Q. Yes, accidental damage. A. Well——

Q. Do you maintain this is anything but accidental? A. It is all accidental damage, yes.

Q. That is what you are claiming?

A. Yes.

Mr. Powers: That is all.

Cross-Examination

By Mr. Gearin:

Q. Mr. Kuckenberg, your discussions with Mr. Stuart Leavy, senior partner of Jewett, Barton, Leavy and Kern, were to the effect that you were to obtain insurance to protect the Southern Pacific for all damage as required by your contract?

A. That's right, that's right.

Q. That is what you tried to do and attempted

(Testimony of Henry A. Kuckenbergl.)

to do, was to get insurance which would pay Southern Pacific Company for all damage in any way occasioned by your activities?

A. Which is covered by our contract; that's right.

Q. That's right? [186] A. Yes.

Q. In other words, if something moved down and damaged the track, that is covered by insurance? A. That's right.

Q. You were bound by the contract with the Public Roads Administration to secure that type of coverage and insurance protection for the railroad? A. That is right.

Q. And that was the second policy that you obtained in order to—that bore the named insured, and names of the Southern Pacific Company and the Western Union Telegraph Company?

A. That's right. I think that is restricted, however, to our work and covered by the contract. That is, we are not responsible for damage that someone else causes.

Q. That is right, if somebody, some bystander throws a rock over the embankment and hits a brakeman down below, that is not liability on you?

A. That is right.

Mr. Gearin: I have no further questions.

Recross-Examination

By Mr. Powers:

Q. That same thing referred to accident, didn't it? A. I think the contract speaks for itself.

(Testimony of Henry A. Kuckenberg.)

Mr. Powers: Yes, I do, too. Thank you. That is all.

Mr. Denecke: That is all.

The Court: That is all.

(Witness excused.) [187]

HARRY M. WILLIAMSON

called in behalf of defendant Southern Pacific Company, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gearin:

Q. Mr. Williamson, what is your occupation?

A. At present I am Assistant Engineer of the maintenance of Southern Pacific Company.

Q. Is that confined to any one division?

A. I have the Pacific System of the Southern Pacific.

Q. Covering what states?

A. Covering Texas, New Mexico, Arizona, California——

The Court: All right, start in asking him the questions.

Q. (By Mr. Gearin): Are you a registered engineer? A. I am.

Q. For the State of Oregon? A. I am.

Q. Were you familiar with the operations which we have discussed here in the relocating of the highway? A. I was and am.

(Testimony of Harry M. Williamson.)

Q. What was your job at that time with Southern Pacific?

A. I was Assistant Division Engineer for the Portland Division Headquarters at Portland.

Q. During that period of time that the operations were being carried on did the Southern Pacific expend labor and materials [188] in connection with its traffic? A. On this job, yes, they did.

Q. For what purpose?

A. To correct damage that was done by the contractor in his activities on it.

Q. Was any labor and material expended or furnished for ordinary maintenance during the period of this work?

A. No, all the equipment, all the materials was furnished the contractor.

Q. Was there any ordinary maintenance carried on, and if not, why not?

A. Not in this detour area. The planking that was placed in there by the contractor at the outset precluded the possibility of what we term ordinary maintenance by that, going in and picking up a tie.

Q. What preparation, if any, was made for the job that was going to be done there in connection with relocation of the highway?

A. Prior to the planking of the railroad, why, our section forces went through and changed our ties that we considered would not last through the period of detouring, and serviced up the railroad so that it would stand a lack of maintenance for the anticipated period of detouring.

(Testimony of Harry M. Williamson.)

Q. How long would that track have, in its condition prior to planking, lasted with ordinary railroad use without being repaired, without any major repairs? [189]

A. Would you state that question again? I am sorry, I didn't get it.

Q. How long would that track have been able to hold up under ordinary use without any great repair work to do?

A. Well, with the normal operation we have up there it would probably go a couple years. They would probably have to take up a few joints, but generally speaking, it would not require any work to speak of.

Q. Were you familiar with the detour area?

A. Yes, I was.

Q. What was the effect of the operation of vehicular traffic on the track?

A. It was very severe upon the track for several reasons. The vehicular traffic, which consisted not only of automobiles, but very heavy commercial trucks hauling veneer and plywood from Idaho, they would traverse, and because of the rails being centered, why, it was necessary for the highway traffic to either straddle the rail on one side or the other which, of course, puts an unbalanced load on our tie structure and depressed our track on one side or the other, and we got what we considered in trainmen's terms very rough track. It was out of level, out of surface, and it was very rough.

(Testimony of Harry M. Williamson.)

Q. How would that compare, that type of use, with ordinary train use?

A. Well, it would be much greatly accelerated, the deterioration [190] of the track, because this vehicular traffic, these heavy loads of contractor's equipment occasionally go up it, his Tournapulls and dozers, and it affected the track structure a great deal more than the train.

Q. Mr. Williams, when tracks are prepared are they prepared for a centered load, on-center loading, even distribution between the ties or rails?

A. Oh, yes, the rails are centered on the ties. I mean the bearing surface is equally distributed.

Q. Were you familiar with the Sardine Creek derailment? Do you know about where and when it occurred?

A. Sure, I am familiar with that location.

Q. The river side is on which side of the track, high or the low side?

A. Well, it is on the inside of the curve. We speak of the low side of the curve as being the inside and the river would be on the low side of the curve.

Q. Were you familiar with the point of derailment?

A. Yes, the general location of it, yes.

Q. Mr. Williamson, assuming a derailment at the point of derailment on the low side of the track at a point where a joint was made, and assuming further that there was a thin flange of a truck of a car that was derailed, do you have an opinion

(Testimony of Harry M. Williamson.)

based upon your experience and training as to the cause of the derailment?

A. Well, from the testimony that was [191] offered—

Q. You have to answer that yes or no.

A. Yes, yes, I have an opinion.

Q. What is your opinion?

A. My opinion would be that the condition of the flange on the low rail which is a lapped, a lapped joint. A lapped joint in railroad terminology, the gauge side of the inside of the rail, it is not continuous. In other words, one rail is butted up against the other, and there is a horizontal lapping there, so if a flange would come along that was sharp or it was a flat contoured flange, would come up against the butt end of the rail and strike it, there would be a possibility or probability of derailment.

Q. Were you familiar with the condition of the track and the detour at Sardine Creek at the time of the derailment?

A. I was familiar with the—I was familiar with that in a general way, I can say.

Q. What was its condition?

A. It was very rough like the whole entire detour area.

Q. Did the condition of the detour at that point cause you any apprehension as to the safety of the trains?

A. Yes, we were quite concerned. As a matter of fact, we reduced the speed of our trains through

(Testimony of Harry M. Williamson.)

the area, one reason being—we reduced them from our normally bulletined operation speed of 15 miles an hour to eight, one reason being because of the condition of the track, and the second, of course, we were [192] apprehensive of rocks falling down in front of them. A lower speed would give them more time to stop.

Q. Do you have an opinion as to whether or not the condition of the track prior to the derailment—strike that—do you have knowledge of any track or steel rails being furnished Kuckenberg Construction Company for the repair work?

A. Yes, I do.

Q. Were those tracks or rails paid for?

A. No, sir; no, sir. There is three thousand feet, some three thousand feet, I think, we furnished the material.

Q. Were you familiar with this road prior to the time that the Kuckenberg interests came in there and started the highway relocation?

A. Yes, we had been operating up there for many years.

Q. What is the slide history in this area, Mr. Williamson? Do they have rocks, boulders, trees, stumps, on the roadway very often?

A. No, rather infrequently. Of course, in the previous winters we have had trees down, and we have had rocks down, but they were very infrequent. The line would probably be tied up on an average, maybe once or twice or three times during the winter season with a stump or tree, there might be

(Testimony of Harry M. Williamson.)

trees down that would cause trains to be delayed and have to change our rails at what we called the weathered line. We have it on our other branches where the line has been in existence like that [193] there for 40 or 50 years, and if the ground is not disturbed, why, it gradually stabilizes itself.

Q. Now, after this was over, and confining my question to the detour, what resurfacing or repair work did the contractor do with reference to the detour area?

A. Well, in compliance with the contract, Mr. Struble, myself, and Mr. Lind and our Road Master, Mr. Parker, went over the railroad in the detour area, and we pointed out to the contractor the locations where repairs would have to be made before we would give a release to the Bureau of Public Roads, before we accepted the railroad in the detour area to be turned back to us, and that in turn would release the Bureau to make payment.

We pointed those out to Mr. Lind, and the work was done in those specific locations, and they did not comprise a complete resurfacing or refinishing of the detour area. There was just isolated locations that damages would occur.

Q. When they completed resurfacing, what was the condition of the roadway with particular reference to the condition prior to the time the planks were put down?

A. Oh, it was much poorer condition than when they planked it.

(Testimony of Harry M. Williamson.)

Q. I understand that you accepted the resurfacing?

A. We accepted the resurfacing because at that time because of the construction of the dam there the United States Government was purchasing the railroad from us rather than relocate it for us because, of course, our railroad was right in the bottom of [194] the river. It would be inundated by the construction of the Detroit Dam anyway, and we knew that we would not have to operate over it for a very short time, and, consequently, we accepted that, and we were much more lenient in our acceptance of maintenance work that was done than we would be had we contemplated continuing operation.

Q. After the sale was completed did you ever operate up there again? A. No.

Q. Is there a particular reason for that?

A. Well, the railroad was in such shape that we would not want to continue operating up there unless considerable work was done to rehabilitate it.

Mr. Gearin: You may inquire.

Mr. Powers: No questions.

Cross-Examination

By Mr. Denecke:

Q. Ordinarily, Mr. Williamson, before the construction you had a regular crew that did the maintenance work on this section where the construction was as well as about 10 more miles of road?

A. Yes, we did, with headquarters at Detroit.

Q. There was no regular routine maintenance

(Testimony of Harry M. Williamson.)

done on this particular section where the detour was for between a year and a half and two years?

A. You are referring to the period during which it was planked? [195]

Q. That is right.

A. No, it could not be done because of the planking. You could not get under the track.

Mr. Denecke: That is all, your Honor.

The Court: That is all.

(Witness excused.)

The Court: We will take a recess.

(Afternoon recess taken.)

The Court: During the recess Mr. Struble called my attention to the fact that he made an error in computation and the difference between the low and the next to the lowest bid was not \$70,000 but somewhere around \$20,000, a very narrow difference between the two. [196]

J. STUART LEAVY

a witness produced in behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Denecke:

Q. Mr. Leavy, you have been in the general insurance business in Portland, Oregon, for quite a number of years; have you not? A. Yes.

(Testimony of J. Stuart Leavy.)

Q. You are a partner in Jewett, Barton, Leavy & Kern? A. Yes.

Q. What is your official relationship to Hartford Accident and Indemnity?

A. The firm of Jewett, Barton, Leavy & Kern are agents of Hartford Accident and Indemnity Company.

Q. Can you explain what sort of agents you are for them? Is that a general agency?

A. Well, we are called as having a general agency contract. Actually, we are more strictly a local agency.

Q. How long have you so represented Hartford?

A. Well, the agency has represented them since 1914, I think, or 1915.

Q. Do you still represent Hartford?

A. Yes.

Q. The Agency? A. Yes. [197]

Q. In the winter, the early winter, the early months of 1947 did you have occasion—you did have occasion to discuss with Mr. Henry Kuckenber regarding insurance for the work that he hoped to get on the North Santiam?

A. Yes, I was hesitating because I couldn't remember whether it was fall or spring.

Q. His testimony was that he bid the job in February of 1947? A. Yes.

Q. If you have any question about these dates, Mr. Leavy, just ask. We have had a lot of testimony, and I think we have pretty well agreed on the dates.

(Testimony of J. Stuart Leavy.)

Mr. Kuckenberg gave you the bid proposal and specifications for this particular contract?

A. Yes.

Q. Did he ask you then to provide him with the insurance necessary to cover him against—

Mr. Powers: Why don't you ask the witness what he asked him? You are leading him.

The Court: Oh, he understands this business. You can ask him any questions.

Mr. Powers: Well, he can say it. I don't think he actually knows what was there—Mr. Leavy can tell you.

Q. (By Mr. Denecke): Mr. Leavy, would you tell us what occurred then?

A. Well, we solicited Kuckenberg Construction Company for their [197-a] business and also the contract bond that came up. They already had a blanket Public Liability and Property Damage policy, and that expired in April, and I solicited Mr. Kuckenberg for that particular coverage which was a blanket Liability and Property Damage, and that policy came into effect, I think, in April of 1947, so we pointed out—sales propaganda—some of the deficiencies of his present policy and showed him how much broader our contract was and more favorable, and we persuaded him to switch his insurance from the Continental Casualty Company to us, which we placed in the Hartford.

Q. Now, was there a discussion between you and Mr. Kuckenberg as to the, his liability for damage to the railroad and the railroad right of way

(Testimony of J. Stuart Leavy.)
on this North Santiam job?

A. Well, yes, there was a discussion, but I cannot recite that in too great particular because it was rather involved.

We had to write a policy for the Kuckenberg Construction Company which would cover them against injury to persons and damage to property of others, and the contract, as I remember, also included damage to the railroad company, and that the railroad company would require a policy to be written in their name known as a railroad protective policy. So we issued two policies. We issued one in the name of the Kuckenberg Construction Company, which was a blanket Liability and Property damage. Then we issued a railroad protective policy in the name of the Southern Pacific, and that took care of—the [198] railroad policy was presumed at least to take care of the contractual or any claims that would be brought against Southern Pacific arising out of Kuckenberg Construction Company's activities.

The Court: What was the name of that second policy, a railroad what?

The Witness: Protective contingent.

The Court: A railroad protective contingent policy?

The Witness: Well, they used two terms, your Honor. They sometimes call it contingent policy; sometimes call it protective.

The Court: Tell us what that second policy did.

(Testimony of J. Stuart Leavy.)

The Witness: The second policy?

Mr. Denecke: Excuse me. Would you like to see the policy, Mr. Leavy? You probably have not seen it.

The Court: Oh, he has seen it.

The Witness: The second policy would protect the Southern Pacific Company in case any claimant presented claim for damage to their property or their person arising out of operations of Kuckenberg Construction Company.

The Court: Ask him the main question now. Did that protect the Kuckenberg—did it protect the Southern Pacific from the activities of Kuckenberg? In other words, if Kuckenberg damaged the property of the Southern Pacific, did Southern Pacific have any right of action against the insurance company?

The Witness: Well, they might construe it that way because [199] they drew the endorsement that went on the policy. I doubt it, but the insurance which would protect the Kuckenberg Construction Company for damage to the railroad was a policy that we wrote in the name of Kuckenberg Construction Company covering their liability for any damage that they did to the property of others.

Q. (By Mr. Denecke): Mr. Leavy, the words “accidental damage” and “operational damage” have come up here, and you, of course, in your experience have dealt with them probably many times. Would you state to the Court what your purpose was in writing this particular policy with

(Testimony of J. Stuart Leavy.)

regard to what coverage you gave and what coverage you did not intend to give Kuckenberg Construction Company?

Mr. Powers: Well, that would change—

Mr. Denecke: Distinguish between operational and accidental, and I am referring now to the policy naming Kuckenberg as the insured.

Mr. Powers: That would be changing the terms of the written policy, your Honor.

The Court: What is your binding authority for Hartford?

The Witness: Well, the binding authority for the—becomes by virtue of our agency agreement and as is implied under the license, and applied under their license, rather.

The Court: You can bind the company up to a hundred thousand or more—I don't know what the limit of your binding policy is—on standard policies that they issue; is that correct? [200]

The Witness: I assume so.

The Court: Do you have any binding authority on unusual types of policy?

The Witness: Well, we cannot bind on a contract bond.

The Court: You cannot?

The Witness: No.

The Court: Prior to the time that you issued this policy for Kuckenberg, did you consult with some of the officers of the Hartford to explain the problem and get additional authority?

A. Well, I don't recall, I think I consulted with

(Testimony of J. Stuart Leavy.)

them about the rate on it, and we made special rates for the contract, and I also consulted with them on the railroad policy before we issued it, the railroad protective, but in the writing of the blanket public liability and property damage for the Kuckenberg Construction Company we had underwriting authority to issue the policy of that type if there was not anything unusual in it.

The Court: Are there any contract provisions in the blanket public liability and property damage policy that you issued to Kuckenberg?

The Witness: I didn't understand you, your Honor.

The Court: Did you have any contract provisions? Did you protect them, Kuckenberg, for liability assumed by contract?

The Witness: Well, as set out in the policy, it defines contractual liability for leases, spurs, and easements.

The Court: I am not getting it. Perhaps you had better take [201] over the cross-examination.

The Witness: I am sorry, I do not mean to be evasive.

Q. (By Mr. Denecke): Well, as I understood it, if I may lead you a little bit, Mr. Leavy, your last answer there, you covered the contractual liability of Kuckenberg if it was due to an easement, spur track agreement, and I forget what the third was.

A. Leases.

Q. Leases. Would you, Mr. Leavy, explain to the Court the way in which, when you wrote up this

(Testimony of J. Stuart Leavy.)

policy insuring Kuckenberg as the named insured, your intention as to what would be covered under the policy and what would be considered operational?

A. Well, we covered first of all bodily injury, and the insuring clause in the policy, which is standard, recites reference to bodily injuries as resulting from an accident, and we eliminate the term "by accident," which the insurance clause puts it in on an occurrence basis.

On the property damage, that is damage to property of others which occurs through accidental injury. It must be something unexpected, not anticipated at the time the event occurs which caused this unexpected or accidental injury.

The Court: Accidental injury?

The Witness: Accidental damage, I mean. Pardon me.

Q. (By Mr. Denecke): You are familiar, at least generally, with this particular construction job of Mr. Kuckenberg's? [202] A. Yes.

Q. Could you illustrate to the Court, and you can make up these illustrations, Mr. Leavy, as to what were considered or what you, at the time you issued this policy, would consider accidental and what you would consider operational.

Mr. Powers: Well, I do not think that is anything for Mr. Leavy to consider. That is a matter for the Court to conclude now from all the testimony here.

(Testimony of J. Stuart Leavy.)

Mr. Mautz: This is also preliminary to some further testimony by Mr. Leavy, your Honor, and from an officer of the Hartford. I think it will be connected up.

Mr. Powers: Well, he is certainly infringing upon the fact-finding authority of the Court here in this matter.

The Court: Mr. Leavy testified that he already had authority from Hartford to issue their standard policy. He had no authority to deviate from those policies. In fact, he has testified he had no authority to write a policy which assumes contract liability without specific authorizations from the company; is that right, Mr. Leavy?

The Witness: Yes.

The Court: Unless the law provides for fire insurance policies the same as it does for life policies, that the agent of the company is the agent for all purposes, I do not see how Mr. Leavy's interpretation of the policy coverage could enlarge the obligations of the company. [203]

In the first place, let me ask the question. On fire policies is the agent of the company the agent for all purposes? Is there a similar provision with reference to fire policies as there is in connection with life policies?

Mr. Denecke: Your Honor, I think I can answer that generally, that the statements or representations of an agent under a fire policy are held binding upon the insurer despite the fact that the

(Testimony of J. Stuart Leavy.)

fire insurance policy says that that is not so right in the policy.

The Court: Did you plead waiver or estoppel here?

Mr. Powers: Yes——

The Court: You plead waiver?

Mr. Powers: I plead waiver or estoppel as defense to some things that they were claiming.

The Court: Yes, before they came in.

Mr. Powers: That is right.

The Court: What about that Lindstrom case in Oregon which says that you must plead and show waiver? That was a fire policy. Are you acquainted with that case, Mr. Denecke?

Mr. Denecke: Not by name, your Honor, no, I am not.

The Court: I think they went up on a pleading problem, and they held that you could not invoke the doctrine of estoppel, and it had to be done on the basis of waiver, but I am going to let Mr. Leavy testify. He is here, and you ask him any questions you want. [204]

Mr. Denecke: Would you read the last question, please?

(Last question read by the reporter: "Could you illustrate to the Court, and you can make up these illustrations, Mr. Leavy, as to what you considered or what you at the time you issued this policy would consider accidental and what you would consider operational?")

(Testimony of J. Stuart Leavy.)

Mr. Powers: May we have an exception to that?

The Court: Yes.

The Witness: Well, an operational accident would take not only damage but the A—if the face of a cliff would have to be shot off and there was no place for the rock to go except down on a railroad track, that would be operational, and as far as the damage was concerned not accidental, because it was inevitable.

In contrast to that, an operation on the side of a hill or a place that got out of hand and blew trees or rocks clear beyond the comprehension of a proven contractor would be accidental.

The Court: I think you ought to tie it down to the facts of this case, Mr. Denecke.

Q. (By Mr. Denecke): Mr. Leavy, take this illustration, that it was at a place where it was known that rock was going to fall on the track, and protective covering was put on the track, and it was reasonably expected that that protective covering would protect the track from any damage. There was blasting done, and there was an overshoot or, in other words, a lot more rock in a [205] lot larger pieces of rock came down on the track than had been reasonably expected and that, despite the protective covering, that caused damage to the track. We will assume that this is through a place where the contractor reasonably thought that the protective covering would have been ample to save the track and right of way from any damage. Now, in that

(Testimony of J. Stuart Leavy.)

particular instance would you define that as accidental or operational?

A. Well, I don't know, that is a matter of an opinion going out and looking at it. It might well be construed as an accident if it went clear beyond what he ever anticipated on the thing, but that is a matter of interpretation. I might agree to that, and the company would say something else.

The Court: Well, Mr. Leavy, in addition to what Mr. Denecke told you, assume further that every fifth time that they put the covering over the track damage happened that they did not anticipate, and assume further that in an area of 500 feet in length over a period of four or five months damage was caused beyond what they expected 59 times. Would you consider that each of those 59 occurrences was an accident within the meaning of the policy?

The Witness: If it was beyond their expectations or that which the contractor ordinarily would expect.

We have those cases come up quite frequently in connection with blasting, and our contractor puts a blast in where he thinks it is going to react within a certain area, and it goes [206] beyond that, and it shakes down plaster and homes and so forth, and then we have property damage claims which we pay.

The Court: Third parties?

The Witness: Third parties.

The Court: In this particular case the assured was Kuckenberg who was under a contract with the

(Testimony of J. Stuart Leavy.)

Southern Pacific. Would that make any difference?

The Witness: No, we would not assume to insure any contractor against a loss where you know it is going—I mean, where it is inevitable. There has to be an element of accident in it.

The Court: Well, I still do not understand your answer.

Would it cover the Southern Pacific then if Kuckenberg was under contract with Southern Pacific to do this work?

The Witness: If there was an accident, your Honor, yes.

The Court: Let me try once again.

The Witness: I am afraid you got a dumb witness on your hands.

The Court: No, no. Kuckenberg agrees to build a road for the State Highway Commission or Bureau of Roads, and in connection with the construction a considerable amount of blasting has to be done. Southern Pacific owns some right of way on which they have some tracks immediately below the place where they are going to be blasting. Kuckenberg enters into a contract by which it agrees to protect the property of the Southern Pacific and restore it to the condition in which it was prior to any accidents [207] that might occur or any damage that might result from its blasting. The insurance is obtained, one of blanket public liability and property damage policy which has a contract liability provision.

Where the damage occurs with great frequency

(Testimony of J. Stuart Leavy.)

or considerable frequency, would the policy of insurance, the blanket public liability and property damage insurance covering Kuckenberg as an assured, protect it against claims asserted by the railroad company?

The Witness: I would not consider that the frequency had anything to do with it. It would be how has it occurred, whether it was an accident or not, and if the insurance company would stay on the risk long enough you could have 50 accidents or you could have 50 damages which were not accidents, but the operational, that is the inevitable result in there, but because it occurred in one case and because it occurred in ten I do not, in my humble opinion, think that is the test. I think that is how the accident happened or how the event happened, whether it was accidental or whether it was operational.

The Court: It is your statement that at the time you wrote this policy, if Kuckenberg in its operations could not reasonably anticipate the amount of damage that resulted from a blast, under those circumstances the damage cost would be accidental and covered by the policy? [208]

A. Yes, with those—

The Court: Go ahead.

Q. (By Mr. Denecke): Mr. Leavy, did you go up to the job after it was in progress there and after your policy was issued? A. Yes.

Q. Do you recall what the occasion was for your going up there?

(Testimony of J. Stuart Leavy.)

A. Oh, I went as a matter of interest first as underwriting and also in an interest in the contractor's work. Then I went up to see the progress of the work, I think, about three times altogether. I think I made one or two trips with Mr. Krill up there when we had a report of an accident up there, as I recall, a track accident on one occasion.

Q. Did you have any knowledge of damage to the railroad property? A. Yes.

Q. On the anniversary date of this policy which would be in April if April was the—was, that it commenced in April, do you recall any discussion that you had with Hartford Accident and Indemnity regarding the renewal of this policy?

A. Yes.

Q. Do you remember with whom that was?

A. Well, at first we received instructions not to renew the policy, and then later I went to San Francisco and talked with Mr. Posey and Mr. Robinson.

Q. Who are Mr. Posey and Mr. Robinson? [209]

A. Mr. Robinson is the superintendent of the Liability Department of the Hartford, and Mr. Posey is a vice president.

Q. Did they give you any reason why they did not want to renew the policy?

A. Well, they felt—I think there was a Mr. Hitchings there who was with the Claims Department, claims attorney, and they felt from their reports and inspection that had come in up to date that there were going to be some serious claims resulting

(Testimony of J. Stuart Leavy.)

from the operation, and they wanted to retire from the risk.

Q. (By Mr. Denecke): Was there anything said, Mr. Leavy, about whether or not they expected to suffer any loss by reason of writing this policy?

A. Whether they expected—

Q. To suffer any losses by reason of the writing of this policy?

A. Well, they already had them up to that date.

Q. I should say losses by reason of damage to the railroad.

A. I don't recall that the railroad was specifically mentioned. I don't remember that.

Q. Other than the damage to the railroad there had been one personal injury; was there not?

A. Well, I recall the one where an engineer stopped his train suddenly because of a boulder on the track, and it was an old train, as I recall, a logging train, and the couplings were so far apart that when the train came together it threw the conductor of the freight train out of his cab and onto the floor, [210] and I think—I don't know how it was settled, but it was a rather serious claim at the time. At least they thought so.

Q. Other than the personal injury loss which you mention here, were all the other losses which you were discussing down there in March or April concerning the damage to the railroad?

A. All the other losses?

Q. All the other claims or losses or whatever you want to call them.

(Testimony of J. Stuart Leavy.)

A. I can't remember that.

Q. Let me ask it this way. Mr. Leavy, was that the principal subject of discussion, as to the possible loss for damage to the railroad property?

A. I believe, the best I can recollect, that first of all that the risk is what is commonly known because rock blasting and so forth comes in the category of what we called a dangerous or a hot risk and that there would be eventually heavy claims would result because of the terrain of the country and what might happen to the railroad track down below, which we had one loss up there, as I recall it, of some rock that went through a cabin, and the whole character of the risk was why they wanted to get off of it.

The Court: I did not hear, cabin of the Southern Pacific?

The Witness: Yes, sir.

The Court: Well, at the time that you talked to the vice [211] president and superintendent of agencies down there in San Francisco, did you tell them that Kuckenberg was asserting a number of claims against the insurance company by reason of damage to the railroad's property?

The Witness: No, I think that information was already down there.

The Court: That was in April of 1948?

The Witness: 1948.

The Court: But you did not mention it to the company?

The Witness: I don't recall, your Honor. There

(Testimony of J. Stuart Leavy.)

was a general discussion. I was arguing with them for a different reason. I felt that we had written a bond and taken a very substantial premium from the contractor and that the company had some obligation to ride the risk through.

The Court: All right.

Q. (By Mr. Denecke): Are you familiar, Mr. Leavy, with the nature of the claims that Kuckenberg Construction Company has made against Hartford for damage to the railroad?

A. Well, some of them I think I can recall. I remember one that stands out in my memory where a, what do you call this water that comes down in a—

Q. Falls, creek?

A. Not a falls, the lumber where your water comes down—flume. That got out of hand and came down in under Kuckenberg's operations, and in turn went on down to the railroad track [212] and caused them considerable damage, and it was something over which the contractor certainly had no control, and I think that did considerable damage, as I remember it.

Q. Are you familiar with any, generally, with the other claims? A. Some of them, yes.

Q. Those that you are familiar with, Mr. Leavy, do you consider them, in your judgment, accidental or operational?

Mr. Gearin: We object to that, your Honor.

Mr. Mautz: Could I ask him one question, your Honor?

(Testimony of J. Stuart Leavy.)

The Court: Yes.

Q. (By Mr. Mautz): Do you consider those claims, Mr. Leavy, of which you have personal knowlege that have been presented to the insurance company by Mr. Kuckenberg or his company, do you consider them accidental damage claims within the intent and purview of the insurance policy which you wrote for him?

Mr. Powers: We will object to that question. He has no way of knowing that.

The Court: Objection sustained. In the first place, the vice of that question is nobody knows the facts upon which Mr. Leavy is going to make his determination or render his opinion.

Q. (By Mr. Mautz): Could you tell the Court, Mr. Leavy, in addition to the flume damage claim which you just referred ([213] to and had knowledge about, of any other specific claims that Mr. Kuckenberg has presented to the insurance company that constitutes, in your opinion, under this policy which you wrote, accidental damage?

Mr. Powers: Same objection.

The Witness: Well, I don't—

The Court: Let him answer the question. Go ahead, answer.

The Witness: I remember on one trip going up there and seeing a tremendous amount of rock that had come down where they had had a—I don't know what happened, but it was a huge big wedge of rock that came down the mountain, as something that

(Testimony of J. Stuart Leavy.)

they had not anticipated or something had got out of hand, I don't know which.

Q. (By Mr. Mautz): You would consider those accidental damages?

Mr. Powers: Just a moment, he said he didn't know what happened.

The Witness: I wasn't there when it occurred. I saw the result of it, and it was a tremendous pile of rock that was coming down the side of the mountain.

Mr. Denecke: That is all, your Honor. [214]

Cross-Examination

By Mr. Powers:

Q. Just a question or two. You were having quite a time, keeping the Hartford on this risk: were you not?

A. Well, I would not say it was so bad.

Q. Well, you were making representations by letters and so forth that this was clearly not accidental—I will put it that way—isn't that the fact?

A. No, that is not the fact.

Q. All right.

A. I don't understand your question. You mean when I went——

Q. I will ask you this——

A. When I went to San Francisco?

Q. No, whether you did not represent to Hartford you had inspected the job and anybody could see these were just just going to happen, they were

(Testimony of J. Stuart Leavy.)

not accidents? Did you not write that to the Hartford in this letter written May 22nd, 1948, Mr. Leavy, and I will call your attention to the third paragraph.

(Document presented to the witness.)

Q. It was your opinion at that time then, was it, that—May 22nd, 1948, “I might add—” This was written to Mr. Posey, the man you referred to—“I might add that when we were up on the job, Louis Krill took some more pictures; and they will indicate quite conclusively, at least in my mind, that the blasting of rock and the muck that went with it could not help but cause damage to the railroad tracks.” That was your opinion then, was it [215] not?

A. That is in the one particular instance.

Q. You were writing about the general situation with respect to accidents; were you not?

A. No, we were talking about the ones that he took the pictures of.

Q. At this time when this was written the Hartford really wanted the policy canceled and they—

A. Not canceled. They didn't want to renew it.

Q. This was subsequent to the time it was renewed; was it not? A. Oh yes, that's right.

Q. And they kept wanting to cancel it?

A. That's right.

Q. And finally it was canceled?

A. That's right.

Q. And so this was something that they would act on when you wrote this, is it not, to the effect

(Testimony of J. Stuart Leavy.)

that you consider these not accidental at least when you went down to the job; isn't that true?

A. As to that particular event, yes.

Q. It was your intention to write the policy as it was written, that is, an accident policy, and an accident basis, that is correct, isn't it, Mr. Leavy?

A. That's right.

Q. Then, so far as the question about the—which the Court asked you about considering claims, whether you did consider [216] these as claims or whether they could be considered as claims—will you mark this?

(Document, Western Union Telegram, July 6, 1948, marked Defendant's Exhibit No. 117 for identification.)

Q. Did you represent to the Hartford that these claims of Kuckenbergs', so-called lists of Kuckenbergs' claims, that he was not going to present those for claims against the Hartford, in July of 1948, and actually put them in as an offset against the Southern Pacific claim; that they were fighting with the Southern Pacific to get it straightened out?

The Court: Is that after the policy was canceled?

Mr. Powers: No, this was the time when they were trying to keep the policy from being canceled. It was before it was canceled.

The Witness: Well, in this "Confidentially such bills are being presented in anticipation of offset against any future claims which the Southern Pa-

(Testimony of J. Stuart Leavy.)

cific might bring against Kuckenberg," that might have been my opinion at that time.

Q. Yes, in other words, you did not expect any claims at that time, and it was your information that they were just using them as an offset against Southern Pacific?

A. Yes, I am frank to say I am a little vague about it, taking it from this. You see, at the time the policy was renewed we wrote a special letter.

Q. I think I have that here. [217]

A. I think that you have it, and this harks back to the letter that was written.

Mr. Powers: We will offer Defendant's Exhibit No. 116 for identification in evidence.

The Court: Any objection?

Mr. Gearin: No objection.

Mr. Denecke: No objection.

The Court: It may be admitted.

(Document previously marked Defendant's Exhibit No. 116 for identification was received in evidence.)

The Witness: I would like to mention, if your Honor please, what my opinion is in there, that I stated also in this wire: "Obviously this whole matter is involved to a point where it goes beyond either our field as agents or our capacity since legal questions are imminent."

Q. (By Mr. Powers): Did you want to see the original letter when it was renewed?

(Testimony of J. Stuart Leavy.)

A. Yes, I could not find it. Did you get it out of our file?

Q. No, I got it from counsel for Kuckenberg, the plaintiffs. I don't know. He had it marked for identification. That is where I got it. I don't know where it came from.

Mr. Mautz: It is addressed to us, no reason why we should not have it.

Examination

By the Court:

Q. Mr. Leavy, about how much was the premium on these policies on this job? [218]

A. Well, that is—I can get it for you, your Honor, but, you see, in that policy it is blanketed, and there were a lot of charges in that policy that are not chargeable against the job. For instance, Kuckenberg Construction Company had a large fleet of trucks which made up about 50 per cent of the premium. It is my recollection that the premium the first year ran about \$12,000 in the over-all picture. I might be wrong about that.

Q. So for this particular job, taking out the fleet of cars, it would be approximately \$6,000?

A. That's right.

Q. Now, I understand that in March or April you asked the company to renew even though you knew they wanted to get off the risk; is that right?

A. That's right.

Q. You have represented the company for how long?

(Testimony of J. Stuart Leavy.)

A. Well, our agency since 1914, I think it is.

Q. You tried to give the company good business, and you tried to get good business for yourself; is that right?

A. Yes, sir.

Q. Now, at the time that you asked the company to renew did you know that the company was contending that the policy covered them on about 60 different items of damage running up to many, many thousands of dollars?

A. I don't remember any such amounts as that, your Honor, no.

Q. For the period of seven months prior to the time that you [219] asked them to renew there was over 60 different claims totalling many times the amount of the premium. You would not have asked the company to renew if you knew of those facts, would you?

A. Well, no, only to the extent that all the damages or the claims that resulted, but the accident and whatever happened were not all accidents within the terms of the property damage. There could be operational damage there that would not be chargeable against the policy.

Q. Well, how many, did you have any information—

A. Well, I didn't have that, your Honor. These claims went in direct to the Claims Department. We don't always see those.

Q. (By Mr. Powers): Mr. Leavy, getting back to the question the Court asked you about the pre-

(Testimony of J. Stuart Leavy.)

mium paid for this policy, in addition to covering this particular job it covered other operations of Kuckenbergs, didn't it? A. Yes.

Q. Is it not a fact that the premium for the year—isn't it a fact that the premium was written on the lowest rate that you could possibly get because of your representations that there was really nothing involved, and that premium instead of being 12,000 was \$1,633 for the year?

A. I can't answer that without——

Q. Could you if you see the policy?

A. I could if I saw the audit. The premium comes at the end of the job. [220]

Q. Could you tell anything from the rate that was given?

A. No, we have to take the rate and apply it to the payroll, and you do not get that until the policy expires.

Q. If the Hartford's actual records show that——

A. They have the record of it.

Q. And that would be——

A. The \$1600 would be what we call a deposit premium.

Q. Just as a matter of getting records, Mr. Leavy, because you couldn't very well remember premiums collected on this since 1948, as I know, having paid some now for the period from June 26, 1947, to July 27, 1948, what does the earned premium show? That is over the period of a year, that is \$1,801?

A. \$1,801.

Q. And 23 cents?

(Testimony of J. Stuart Leavy.)

A. Yes. What policy is that?

Q. That covers Kuckenberg Construction Company in all their operations, doesn't it?

A. There may be something wrong with that. Where is your fleet in there?

Q. "Driving other cars"?

A. No, "Auto zone."

Q. Here it is (indicating).

A. Here, you see, 2100. This \$1800 is what is left over after the deposit so you have 3900 plus 1800.

Q. What is this return then? What is this return, the earned [221] premium, what does earned premium mean?

A. Premium developed by the payroll with the rate applied to it.

Q. Well, isn't that thing related to this over here (indicating)?

A. Here it is over here (indicating).

Q. Now, the Santiam is, are both these Santiam?

A. Yes.

Q. He has got in another column Harbor Drive in Portland? A. Correct.

Q. Where is this, his permanent yard?

A. That's right.

The Court: I may be mistaken, but I was under the impression that Mr. Kuckenberg had a public liability and property damage policy which covered all of his operations, but by reason of the contract between the Bureau of Roads on this specific contract it was necessary for him to take out two new

(Testimony of J. Stuart Leavy.)

policies, one a railroad protection policy, and the other a specific public liability policy with the contract endorsement; am I correct on that?

Q. (By Mr. Powers): What is the fact there, Mr. Leavy?

A. Well, the specifications required that the contractor maintain insurance of certain limits, public liability and property damage. Now, if he has an insurance already in existence, that policy answers the particular requirement, and the extra policy that we wrote was the railroad protective policy, in the name of the Southern Pacific. [222]

The Court: But the blanket public liability and property damage policy required by the contract was the one that Mr. Kuckenberg had for all of his properties?

The Witness: Yes.

The Court: Oh, I was in error.

Q. (By Mr. Powers): Mr. Leavy, many times you wrote and notified Kuckenberg and his attorneys, did you not, that the policy you wrote would not cover operational damage; isn't that true?

A. Well, I don't say many times. I had a discussion with Mr. Kuckenberg more often about it, and I had one discussion, I think, with Mr. Souther about it.

Q. And then you notified the—as a matter of fact, you notified them in writing at one time, didn't you?

A. Well, that latter part of it here I dictated.

(Testimony of J. Stuart Leavy.)

Q. Yes, and that was the purpose of that, to tell them that you would be bound only by the contract, which was accidental, not for operational claims? A. That is correct.

Q. Up to that time no claims had actually been filed, had they? A. I cannot answer that.

The Court: What month was the letter written?

Mr. Powers: In April, 1948.

Q. (By Mr. Powers): Well, it was after that, it was in June of that year that our exhibit, which is Exhibit—or July 6th that you wired the Hartford stating that, about these bills, there had been these [223] bills: “Confidentially such bills are being presented in anticipation of offset against any future claims which the Southern Pacific might bring against Kuckenberg. Mister Souther advises there is no thought of litigation in the minds of either Kuckenberg or himself as respects Hartford contracts.”

Now, that was your understanding then, was it?

A. Yes, as I recall, it has come back to me now, in reference to that letter that I said I dictated that was thought necessary because the Hartford anticipated there would be an argument, let us say, as to to what would be operational and what would be accidental.

Mr. Powers: We will offer Defendant’s Exhibit No. 117 in evidence, your Honor. Counsel has seen it.

(Testimony of J. Stuart Leavy.)

The Court: Any objection to it?

Mr. Gearin: As long as it is not signed by us, I have no objection to it.

Mr. Mautz: If Mr. Powers considers it impeaching of Mr. Leavy, we have no objection. It can serve no other purpose because it is written by Mr. Leavy, addressed to the Hartford, and it could not bind us anyhow.

Mr. Powers: I move that the argument be deferred to the end of the trial, your Honor, and that the remarks of counsel be stricken. It is necessary in order to refresh Mr. Leavy's memory, as I have said, during the time. He couldn't remember back five years——

Mr. Mautz: Well, counsel in his extensive experience knows [224] when he refreshes a witness' memory with a document he does not put that document in evidence. We have the privilege of doing so if we want to, so if it is not offered to impeach Mr. Leavy it is not offered.

The Court: I think you are right, Mr. Mautz, but I will let it in anyway.

(Document previously marked Defendants' Exhibit No. 117 for identification was received in evidence.)

Mr. Powers: That is all.

(Testimony of J. Stuart Leavy.)

Cross-Examination

By Mr. Gearin:

Q. Mr. Leavy, I am handing you the exhibit which has been marked Exhibit No. 3 in this case and ask you if that isn't a policy in which Southern Pacific Company and the Western Union Telegraph Company is the named insured? A. Yes.

Q. That is the policy that was obtained by Mr. Kuckenberg to comply with the terms of the requirements of the contract of the Public Works Administration? A. That's right.

Q. Now, I direct your attention, Mr. Leavy, to, what do you call this endorsement, No. 1?

A. Yes, sir. [225]

Q. And refer to Paragraph LL of the endorsement, of said endorsement, and which provides that: "the term 'property' " as defined in the contract of insurance, "shall include property in the custody of the Railroad and property of the Railroad."

Now was that language—why was that endorsement attached to the contract?

A. Well, we will have to disclaim any responsibility for this because this endorsement was gotten up by the Southern Pacific Company, and it is their own contract.

Q. That is the contract?

A. I mean, this is what we were required to write.

Q. That's right, well, you wrote it; didn't you?

(Testimony of J. Stuart Leavy.)

A. Yes.

Q. I am referring—you have the document No. 43726. I am handing you our copy of it which is the identical thing dated May 14, 1947. It bears your signature countersigned as the authorized agent?

A. That's right.

Q. And you say that that was required by the railroad? A. Yes, sir.

Q. And you were, you executed that at the request of the railroad?

A. Well, indirectly, that is the railroad informed the contractor who in turn informed us that the railroad company [226] would require this policy and have required their own form of endorsement.

Q. Well, there is no question but what the endorsement No. 1 attached to the exhibit which you hold in your hand was countersigned by you, is there? A. No, sir.

Q. And what was endorsement part LL of the endorsement No. 1 you don't know anything about the necessity for that or anything else. You were told to put it in, and you did it?

A. That's right.

The Court: Let me see this.

Mr. Gearin: I think it has to be read in light, your Honor, of a certain directive in the contract which will be introduced in evidence at a subsequent time.

Q. (By Mr. Gearin): Now, Mr. Leavy, the policy of public liability insurance which Hartford—which Mr. Kuckenberg obtained with Hartford

(Testimony of J. Stuart Leavy.)

was to protect Kuckenberg against claims of all third parties? A. Right.

Q. Which included the claims of the Southern Pacific for damage? A. Anybody.

Q. Anybody.

The Court: Including the Southern Pacific?

Mr. Gearin: Yes. [227]

The Witness: Anyone.

Q. (By Mr. Gearin): At that time you knew of Kuckenberg's obligations under the contracts with the Public Works Administration, first as to their obligation to the Southern Pacific and, secondly, their obligations to provide the insurance for Southern Pacific?

A. Yes, sir.

Q. Those were the policies which were issued with those obligations in mind? A. Yes.

Q. I do not know how to phrase this next question, Mr. Leavy, but had it ever been brought to your attention—was the policy that was issued to Kuckenberg with Kuckenberg as the named insured a policy which would protect and indemnify them as against all liability imposed by law arising out of their obligations? A. Yes.

Q. Had it been brought to your attention, Mr. Leavy, of the liability imposed by law as a result of blasting operation? A. Yes.

Q. In other words, in your average public liability insurance policy referring to automobiles there must be legal liability and negligence, and you had

(Testimony of J. Stuart Leavy.)

been advised at that time that as far as blasting was concerned there was absolute liability for damage?

Mr. Denecke: Where there was blasting.

The Witness: I would not say that I know there was absolute liability. I know the policy would cover legal liability as a result of any damage from blasting.

Q. As I understand it, you say that Mr. Kuckenberg had a policy of public liability which was broad enough to cover the requirements of his contract with the Public Works Administration?

A. Yes.

Q. Mr. Leavy, was there not a special endorsement to that policy covering the particular contractual requirements?

A. No, there would have been if the policy had not been written, one written in the name of Southern Pacific.

Q. Oh, I see.

A. There is no point in charging a contractor twice for the same thing.

Mr. Gearin: Thank you, I have nothing further, your Honor.

Cross-Examination

By Mr. Powers:

Q. Just one or two questions. That means arising out of an accident, doesn't it, Mr. Leavy?

A. Which is that?

Q. The Southern Pacific policy used the word "accident" too; [229] did it not?

A. If I could see it, I could tell you. They have

(Testimony of J. Stuart Leavy.)

made some changes. Ordinarily it has the words "by accident" in it.

Q. Of course, the policy speaks for itself.

A. "Caused by accident."

Mr. Gearin: From the agreement Nos. I and II.

The Witness: "Caused by accident."

Q. (By Mr. Powers): So that is limited to caused by accident, isn't it?

A. I would think so.

Q. Mr. Leavy, in the fall of 1947 sometime after this policy had first been written, is it not a fact that after Mr. Krill had a claim that took him down to the scene of the accident and he saw how rocks were falling down, one thing and another, that Mr. Robinson came to your office in Portland on his way back from Seattle and discussed that with you, and he wanted to cancel it because it didn't want any misinterpretation with anyone, and you assured him at that time that they understood there would be no claim for that type of damage to the railroad track?

A. Well, the only thing I can remember, Mr. Powers, was if that conversation occurred subsequent to this letter that we dictated, I think we did, but I don't recall that before that.

Q. This would be in September, 1947? [230]

A. No, that was '47—'48.

Q. Do you remember the conversation at that time that they came up there? A. In '47?

Q. Yes, in the fall of '47.

A. I am sorry, I don't recall that. I talked—we

(Testimony of J. Stuart Leavy.)

were talking with Mr. Robinson about the risk, but I don't recall that early as 1947, because nothing had happened in 1947.

Q. When you did talk to him, why, you told him, did you not, that there would be no claims made for that type of damage that they were doing down at the track, on this policy?

Mr. Mautz: That is not binding on that, your Honor.

The Court: There is so much evidence in here that is inadmissible that I am not going to stop now.

Q. (By Mr. Powers): At the time you said you had a conversation with Mr. Robinson, did you not assure him at that time that there would be no claim for this type of damage?

A. Well, our policy did not attach until the spring of 1947, and you say this conversation was in the fall of 1947?

Q. That is what I was asking you, and you say it was later?

A. Well, within my memory, the way I recall it is a conversation with Mr. Robinson which was subsequent to this letter that we wrote, which was in April of 1948.

Q. What was that? [231]

A. That is, that there would be no claims that any damage done by, unless, if it was operational, in other words, rather than accidental.

Q. You don't recall that conversation back in September?

(Testimony of J. Stuart Leavy.)

A. In September, 1947, no, I don't remember.

Mr. Powers: I think that is all.

Redirect Examination

By Mr. Mautz:

Q. But, subsequently Mr. Robinson, after he saw or Mr. Krill told him that there were rocks dropping down on the Southern Pacific track resulting from this job, he wanted to get off this legal liability policy; did he not?

A. That was near the renewal date.

Q. Yes, whenever it was, Mr. Leavy?

A. Yes.

Q. Your talk with Mr. Souther, as reflected in the wire, had to do with distinguishing between those claims that were coming up that might be considered operational and those claims that might be considered accidental; isn't that so?

A. Yes, I think that's right.

Q. When you wired the Hartford in May of 1948 that Mr. Souther did not anticipate any case against the Hartford, you did not anticipate that your client here was going to have a case against them at that time either, did you, Mr. Leavy?

A. No. [232]

Q. Now, counsel has gone into some length with you about premiums. As a matter of fact, when you are writing a line of coverage for somebody like Kuckenberg or Kuckenberg Construction Company, you do not base value of the account just upon the premium of one policy, do you, either for yourself or for your company?

A. That's right.

(Testimony of J. Stuart Leavy.)

Q. You were writing the bond on this job?

A. That's right.

Q. And you had other allied lines for Mr. Kuckenberg?
A. That's right.

Q. And all that is taken into consideration as to whether it is a desirable account or not, is it not?

A. That's right.

Mr. Mautz: That's all.

Recross-Examination

By Mr. Powers:

Q. Mr. Leavy, the bond was not in the Hartford, was it?
A. It certainly was.

Q. Well, I am asking.

Mr. Mautz: He answered.

Q. (By Mr. Powers): Was it?

A. Yes, about \$38,000 worth.

Q. But, I mean, was it carried right through all the time? [233]
A. Sure.

Q. That is all.

Recross-Examination

By Mr. Gearin:

Q. I would like to ask Mr. Leavy, I would like to have him explain this telegram.

I will let you read it with me, Mr. Leavy: "Have had lengthy discussion with Mister Souther regarding Kuckenberg and bills of latter presented to Southern Pacific have all been denied."

In other words, you knew that the contractor

(Testimony of J. Stuart Leavy.)

was trying to get Southern Pacific to pay for damage to the track?

A. I knew they were, and this is from memory, your Honor, I knew there were claims arising, claims from the Southern Pacific, and some of them, as I remember, were claims which Kuckenberg did not feel he was responsible for.

Q. I see. Then when you say: "Confidentially such bills are being presented in anticipation of offset against any future claims which the Southern Pacific might bring against Kuckenberg," in other words, the trap was laid at that time to present these claims against us and hoping that they would scare the Southern Pacific Company out of presenting any claims; was that what they were doing?

A. Are you asking me if I laid a trap? [234]

Q. No, not you, nobody is pointing a finger at you, but I want to know why you say confidentially. Was there some confidential agreement between you and Mr. Souther or Kuckenberg and Mr. Souther about how they were going to get Southern Pacific in the picture?

A. No, I think our relationship with the company we represent in a matter of that kind, I would use the word "confidential" hoping what wouldn't happen is what has happened.

Mr. Gearin: That is all, thank you.

Mr. Denecke: No further questions.

(Witness excused.) [235]

HENRY A. KUCKENBERG

recalled, testified further as follows:

Direct Examination

By Mr. Denecke:

Q. Mr. Kuckenberg, you were presented with certain claims by the Southern Pacific during the course of this work; were you not?

A. Yes, we were.

Q. And all those claims have now been paid by you except those for which Southern Pacific is now counterclaiming?

A. That is correct. We paid all the bills that we felt our company were liable for. All that we left were accidental damage we presented to the insurance company to pay, which they have done in the past, and these they refused.

Mr. Denecke: That is all, your Honor.

The Court: You mean Hartford has not paid any of these?

A. That's right. We presented them to Hartford.

Q. (By Mr. Powers): Well, you knew all along, did you, Mr. Kuckenberg, that the Hartford was not going to pay for what might be operational in nature, and they were only concerned with accidents?

A. That's right, we only presented them with accidental damage claims.

Mr. Powers: That's all.

Q. (By Mr. Gearin): Mr. Kuckenberg, the

(Testimony of Henry A. Kuckenberg.)

bills that you submitted to the Southern Pacific, were those covering accidents or operation?

A. Accidental claims, accidental damage claims, what were [236] presented Hartford.

Q. Maybe you misunderstood me. The bills that you submitted to the Southern Pacific Company covered accidental damage or operational damage?

The Court: Or neither?

The Witness: I would say that I think we would have to take them one at a time. I would say when a train ran off the track, I would say we considered that that was your own damage. We had nothing to do with it whatsoever, and we billed you for the time that we spent getting your cars out, as I recall it.

Q. Now, what about the Mayflower Creek wash-out?

A. We were instructed by your people to repair your tracks and to repair the work around your tracks, and we felt that that was your damage.

Q. I see.

A. Whether you had insurance to cover it, we didn't know. We felt that you should pay us for that.

Q. And the same about reconditioning?

A. Yes.

Q. And where the shots fell on the track did you, those are all the same?

A. That's right.

Q. You felt that those damages were not occasioned in whole or in part by any activities of

(Testimony of Henry A. Kuckenberg.)

yours? A. That's right; that is correct. [237]

Q. They were not accidents?

A. They might have been accidents. I don't say they were not, but my claim is that we were not responsible for them, but the Southern Pacific were, and we were looking to you for payment.

Q. And those bills that were submitted to you by Southern Pacific Company covering items of train delay you received—

A. Anything that was accidental damage we sent to Hartford for to pay them, and any of the bills that we felt were our liability we paid.

Q. Then our bills that we submitted, did you turn those over to Hartford for payment?

A. That is just what I have told you. Some of them we did, and the others we paid.

Q. I see, that's all.

Mr. Powers: That is all.

Mr. Denecke: That is all.

Your Honor, I would like to introduce an exhibit that we have had in the Pretrial, a letter that has been talked about here in the testimony that we marked Plaintiffs' Exhibit 16.

The Court: You all have Mr. Denecke's exhibit numbers and the description of the exhibits which he had marked. Is there any objection to having all such exhibits admitted in evidence?

Mr. Gearin: We have no objection to any pre-trial exhibits, your Honor. [238]

Mr. Powers: We have none, with this provision, that this starts out a series of correspondence that

follows along and needs the others to complete it over a period of just a couple of months involving this same thing.

Mr. Denecke: Not this one, your Honor.

Mr. Powers: I am speaking of this letter of April 15, 1948. I have them marked for identification over there now, and if this goes in I would like to have the rest of it go in to show what goes on.

The Court: Any objection, Mr. Denecke?

Mr. Denecke: Well, your Honor, this letter that I referred to there was the letter from Kuckenberg Construction Company, rather from Jewett, Barton, Leavy & Kern, and Kuckenberg Construction Company, this correspondence back and forth between Hartford and Mr. Leavy. I think Mr. Leavy testified this is the only letter he sent to Kuckenberg. I have looked at these, and I may have no objection, your Honor.

Mr. Mautz: They are along the same line of the wire, your Honor. If you are going to let the wire in, you may as well let them all in.

The Court: They may be admitted. Mr. Denecke, any more testimony?

Mr. Denecke: No, your Honor.

The Court: Mr. Powers, do you have anything?

Mr. Powers: I don't believe there is anything else, your Honor. [239]

Oh, yes, since Mr. Robinson is here I might just ask a question or two. [240]

EDWARD W. ROBINSON

a witness produced in behalf of defendant Hartford Accident and Indemnity Company, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Powers:

Q. Mr. Robinson, where do you live?

A. Corte Madera, California.

Q. Is that somewhere around San Francisco?

A. It is about 14 miles north of San Francisco.

Q. And you are employed where?

A. Hartford Accident and Indemnity Company.

Q. You work in and travel out of the Hartford office in San Francisco, do you?

A. That is right.

Q. In what branch of the company are you?

A. I am superintendent of the General Liability Department.

Q. Now, in connection with this policy of Kuckenberg's that we are discussing here, what kind of a premium was given that, as being high or low?

A. I do not remember particularly the premium rate for the Kuckenberg policy although I believe there was a reduction from annual rates.

Q. Then I will ask you when you first had any conversation with Mr. Stuart Leavy about this policy?

A. In October, 1947. [241]

Q. Do you remember the date?

A. I think it is October 20, 21.

(Testimony of Edward W. Robinson.)

Q. Did you check your records or expense account? A. I checked my expense account.

Q. What was the conversation, that is, whether you asked Mr. Leavy about——

Mr. Mautz: Unless, your Honor is going to let in everything I do not know whether conversation between Mr. Robinson and Mr. Leavy would be binding upon the other parties.

The Court: I know it.

Mr. Mautz: But, in view of your Honor's ruling we would like the record to show a continuing objection, and we remain silent.

Mr. Powers: What was that?

The Witness: I had been in Seattle and met Mr. Hitchings who is our Pacific Coast claims attorney. He had been in Portland here, and Mr. Krill had been out on the job on, I think, a couple bodily injury cases.

Q. A couple personal injuries?

The Witness: Bodily injury cases, and he had seen this rock coming down on the track so Mr. Hitchings talked to me in Seattle and I intended to go direct to San Francisco, but stopped off here and saw Mr. Leavy. I spoke to him about it. I do not believe that any claims have been presented to us at that time, and told him that where damage was done, if somebody would try to collect we didn't continue on any policy if there was possibility [242] of a dispute in the event of a claim.

Q. What did Mr. Leavy say about that?

(Testimony of Edward W. Robinson.)

A. He assured me there would be no claims. Mr. Kuckenbergr understood the coverage.

Q. No claims for damage to the track?

A. That is right.

Q. That is in 1947? A. Yes.

Q. That is all.

Cross-Examination

By Mr. Mautz:

Q. Nobody from Kuckenbergr was there, Mr. Robinson? Any of his attorneys? A. No.

Mr. Mautz: That is all.

Mr. Powers: Is that all?

Mr. Gearin: That is all.

Mr. Powers: If everyone has rested on this portion of the case, which I assume they have—has plaintiff rested?

Mr. Denecke: Yes.

Mr. Powers: Has Southern Pacific rested?

Mr. Mautz: They never rest.

Mr. Gearin: You don't give me a chance.

Your Honor, other than to present testimony as to our damage on the counterclaim, we have no further evidence to introduce. [243]

The Court: I told you, Mr. Powers, that if I felt it necessary I would give you an opportunity to bring your witnesses from San Francisco, but I have not found it necessary yet. I may, but go ahead. You wanted to say something?

Mr. Powers: I was going to move the Court now

to make a finding that under the evidence presented here that the series of occurrences or events following a general pattern as they do constitute an operation which could have been reasonably foreseen and which was actually provided for and warned against and told about in the contract in figuring and telling them to figure and make whatever allowance was necessary and, therefore, the Court at this time find that the series of events presented do not constitute accidents, therefore, there is no coverage under the policy, and that summary judgment be entered in favor of the defendant Hartford Accident Indemnity Company.

Mr. Denecke: Your Honor, I have done quite a great deal of research on this problem. It is not quite in form which I would like to submit to the Court so I ask leave to submit to the Court written brief on this one particular point that these events did constitute accidents.

The Court: I think that is the principal question, whether or not the facts indicate that these occurrences were accidents.

I think we have got two legal words there, accidents and occurrences, each with specific meanings. I am not going to give the testimony of Mr. Leavy much credence. [244]

I want to say I was surprised and pleased to see an agent go to bat for his client as well as Mr. Leavy did, but he is not in a position to vary the terms of that contract, but I did listen to what he had to say about what constitutes an accident, and I was wondering whether or not the authorities support his

statement, and I understand that that is what you are going to present me with in brief.

Mr. Denecke: That is correct, your Honor.

The Court: I am going to suggest this, that Hartford prepare no form of brief. You just give me the cases upon which you rely and send me a copy and send Mr. Gearin—he does not want one—send it to Mr. Powers, and Mr. Powers, in a reasonable length of time, try to get in your answer. That is all I ask you for, is to give me the list of your cases. I will read the cases myself. Give me the cases that are in point.

(Discussion off the record.)

The Court: I am going to deny your motion for summary judgment, Mr. Powers, because I do not think that that is the right kind of motion.

This case is here on the question of liability, and if I find for you on an issue, it will not be a summary judgment; it will be determinative.

Mr. Powers: I will change the motion, then, and correct it in accordance with the Court's views to make it final and determinative of the final issues by that one issue. [245]

Mr. Gearin: Having the benefit of the testimony, I think your Honor will have to make findings as to the type of accident covered in the remaining four charges of the plaintiffs against the Southern Pacific Company, the derailment, the wash-out, the road falling on the track, and the general resurfacing, those being the four elements.

The Court: I will never be in a better position to

decide a couple of them than now. I am going to hold against Kuckenberg on the resurfacing.

Now, I think the Southern Pacific may have had some advantage, but that was contemplated in the policy and, therefore, I am going to hold against Kuckenberg on that point.

Now, what was the third point you had?

Mr. Gearin: There are four of them.

The Court: Give me number three.

Mr. Denecke: That was the section of the road that fell on the track, your Honor.

The Court: I am going against you, against Kuckenberg on number three.

Now, with reference to the railroad—

Mr. Gearin: The derailment.

The Court: The derailment, it seems to me that Kuckenberg has a good claim there, a car going eight miles an hour, and there was only three-sixteenths of an inch out of line. I just cannot see how Kuckenberg could have taken more precautions. Here the work was being performed by Kuckenberg's men but under [246] the general supervision of one of the men who works for Southern Pacific, and so I am going to hold against Southern Pacific on that one, and hold with Kuckenberg.

Mr. Gearin: The next one is the washout of the bridge where debris got under the bridge and water had to go over the ties.

The Court: I do not know about that one. I do not know if I have enough evidence to decide it. I know that in that area—Mr. Denecke had it here in a different case—that there are unusual freshets and

water coming down these little rivers, but it has not been made clear to me as to whether this mud and clay and debris and various other items that washed into the river came from locations in which they were working.

Mr. Gearin: The testimony is, if I may refer to it briefly, your Honor, by our two witnesses, is that the mud, clay and rocks came from a slide directly above the bridge, and I think that is the testimony. I think that is all the testimony on the case.

The Court: Was the contractor working around there?

Mr. Gearin: That is correct, and fill was put in by the contractor.

The Court: Is that correct?

Mr. Denecke: Your Honor, I think the testimony of both witnesses was that they came up afterwards and thought that is where it came from, but this material, as I understand it, it [247-8] was, they said, the same kind of material as you find up and down the river so I know that that was their surmise that that was where it came from, but I think that is all it was.

The Court: However, you have the burden of proof on that.

Mr. Denecke: I realize that, your Honor.

The Court: In view of the fact that you have to sustain the burden, I am going to hold against you on that also, so the only one I hold with Kuckenberg is on the derailment.

Is there any question about damages on that one?

Mr. Gearin: Well, I think we might be able to

agree with Mr. Denecke on the damages. I think there may be a trade, as we always do. I think we might be in a position to attempt that. However, I want to put some strings on it as far as our claims are concerned when we prove our damages.

Mr. Denecke: Your Honor, is it sufficient now, if it looks like we can arrive at a figure there.

The Court: In other words, that means if I find in favor of Kuckenberg on that claim, I hold against you on your claim for \$241. I believe you have a counterclaim for \$241.

Mr. Gearin: Not on that. It will be so understood, your Honor, that we will not, in view of your Honor's finding, make any claim for the derailment expense.

The Court: Is there any other thing that we have to decide right now?

Mr. Gearin: No. [249]

Mr. Denecke: No.

The Court: I just want to say that when a contractor enters into the type of contract that Mr. Kuckenberg entered into with Southern Pacific, under these circumstances, that he is going to get the short end of the stick because there is blasting over there; there is work with heavy equipment, and before he can prevail on a claim he has got to bear the burden of proof, and it is a difficult thing, but that is one of the considerations that a contractor must contract in view of.

(Thereupon, the trial of the above-entitled cause was concluded.) [250]

Reporter's Certificate

I, Gordon R. Griffiths, an official reporter to the United States District Court of the District of Oregon, hereby certify that at the time and place mentioned in the caption of the above-entitled cause I reported in shorthand all testimony adduced and proceedings had in said cause; that my shorthand notes were thereafter reduced to typewriting, under my direction, and that the foregoing transcript consisted of 250 pages, is a true and correct transcript of all the testimony adduced and proceedings had as aforesaid, and of the whole thereof.

Witness my hand at Portland, Oregon, this 3rd day of July, 1954.

/s/ GORDON R. GRIFFITHS,
Official Court Reporter. [251]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
District of Oregon—ss.

I, F. L. Buck, Acting Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents numbered from 1 to 10, inclusive, consisting of Pre-trial order; Copy of oral opinion; Findings of Fact and Conclusions of Law; Judgment; Notice of appeal; Undertaking on appeal; Order extending time to July 6, 1954, to file

record on appeal; Designation of contents of record on appeal; Order to forward exhibits to Court of Appeals and Transcript of docket entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 5092, in which Henry A. Kuckenberg, et al., are plaintiffs and appellants and Hartford Accident & Indemnity Company is the defendant and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is being forwarded under separate cover the following exhibits: 2 to 6, inc.; 16-18 to 23, inc.; 25 A to 25 G, inc.; 26 A to 26 I, inc.; 27-28-101-107-110-112 to 121, inc., and 305. Transcripts referred to in appellants' designation not yet prepared, will be forwarded when completed.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 2nd day of July, 1954.

[Seal] /s/ F. L. BUCK,
Acting Clerk.

[Endorsed]: No. 14,415. United States Court of Appeals for the Ninth Circuit. Henry A. Kuckenberg, Harriet Kuckenberg and Lawrence Kuckenberg, Doing Business as Kuckenberg Construction Co., Appellants, vs. Hartford Accident & Indemnity Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed July 6, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit

No. 14415

HENRY A. KUCKENBERG, HARRIET KUCK-
ENBERG, AND LAWRENCE KUCKEN-
BERG, d.b.a. KUCKENBERG CONSTRUC-
TION CO.,

Appellants,

vs.

HARTFORD ACCIDENT & INDEMNITY COM-
PANY, a Corporation,

Respondent.

STATEMENT OF THE POINTS ON WHICH
APPELLANTS INTEND TO RELY

Pursuant to Rule 19(c) of the Rule of the above-entitled Court the appellants present the following statements of the points on which they intend to rely on this appeal:

1. The Trial Court erred in finding and concluding that the injury and damage to the property of the Southern Pacific Company was the reasonably anticipated, ordinary and expected result of appellants operation under the circumstances and did not result from "accident." (Findings of Fact, Para. 13; Conclusions of Law, Para. 1).

2. The Trial Court erred in concluding that the respondent is not required under the relevant policies of insurance to appear and defend on behalf of the appellants against actions or claims brought against the appellants by Southern Pacific Com-

pany for damages resulting from appellants' road-building operations. (Conclusion of Law, Para. 3.)

MAUTZ, SOUTHER, SPAULD-
ING, DENECKE & KINSEY,

By /s/ ARNO H. DENECKE,
Of Attorneys for Appellants.

Service of copy acknowledged.

[Endorsed]: Filed July 9, 1954.

[Title of Court of Appeals and Cause.]

STIPULATION AND APPLICATION TO BE
RELIEVED FROM PRINTING OR RE-
PRODUCING EXHIBITS

It is hereby Stipulated by and between the respective parties hereto acting by and through their respective attorneys that the parties hereto request the Court to be relieved from printing or reproducing exhibits introduced at the trial of this action, and request the Court that the exhibits be considered in their original form without reproduction.

Said request is made for the reason, among others, that a portion of some of said exhibits are more easily comprehended in their original form than they would be in reproduction.

/s/ ARNO H. DENECKE,
Of Attorneys for Appellants.

/s/ JAMES ARTHUR POWERS,
By /s/ EARLE P. SKOW,
Of Attorneys for Respondent.

[Endorsed]: Filed July 12, 1954.

THE UNIVERSITY OF CHICAGO
DEPARTMENT OF CHEMISTRY
1155 EAST 58TH STREET
CHICAGO, ILLINOIS 60637

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DR. J. H. GOLDSTEIN

TO
DR. R. M. MAYER

RE
POLYMERIZATION OF STYRENE

BY
DR. J. H. GOLDSTEIN

AND
DR. R. M. MAYER

CHICAGO, ILLINOIS

1964

CHICAGO, ILLINOIS